TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 468

STEVEN I. ENGEL, ET AL., PETITIONERS,

vs.

WILLIAM J. VITALE, JR., ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED OCTOBER 3, 1961

CERTIORARI GRANTED DECEMBER 4, 1961

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New York Supreme Court

Appellate Division—Second Department

In the Matter of the Application

of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,
Petitioners-Appellants,

against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE PARCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,
Respondents-Respondents,

directing them to discontinue a certain school practice

and

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,
Intervenor-Respondents-Respondents.

Statement Under Rule 234

This is an appeal by petitioners from an order in a proceeding under Article 78 of the Civil Practice Act dismissing the petition herein and denying petitioners' request for an order directing respondents, constituting the Board of Education of Union Free School District, Number 9, New

Hyde Park, New York, to discontinue or to cause to be discontinued, in the schools of the said school district the saying of a prayer designated by respondents as the "Regents Prayer", which prayer is now said daily in the said schools following the Salute to the Flag pursuant to a resolution passed by respondents.

The order denying the petition herein was made on October 5, 1959 by the Hon. Bernard S. Meyer, sitting in Special Term, Part I, of the Supreme
5 Court, Nassau County. It was entered on the same day in the office of the Clerk of Nassau County, and a copy thereof with notice of entry was served on petitioners on October 14, 1959.

The proceeding herein was commenced by service of a notice of motion and verified petition on January 22, 1959.

Respondents' affidavit in opposition with annexed exhibits and a verified answer, together with respondents' notice of motion to dismiss the petition, were served on petitioners on February
6 19, 1959.

Petitioners' reply to respondents' answer was served on all parties on March 2, 1959.

The notice of appeal from Judge Meyer's order was served on all parties on October 23, 1959, and filed on October 26, 1959.

The names of the original petitioners are Steven I. Engel, Daniel Lichtenstein, Monroe Lerner, Lenore Lyons and Lawrence Roth.

The names of the original respondents are William J. Vitale, Jr., Philip J. Freed, Mary Harte, Anne Birch and Richard Saunders, con-

stituting the Board of Education of Union Free School District, Number 9, New Hyde Park, New York.

By order made and entered on February 24, 1959, the intervenor-respondents were permitted to intervene, but their intervention was limited to the merits of the constitutional questions raised under the applicable provisions of the Constitution of the United States and the Constitution of the State of New York. The same order provided that the proposed answer of intervenor-respondents, which was part of their motion papers, be deemed served on petitioners simultaneously with the signing of the order.

The names of the intervenor-respondents are Henry Holleaberg, Rose Levine, Martin Abrams, Helen Swanson, Walter F. Gibb, Jane Ehlen, Ralph B. Webb, Virginia Zimmerman, Virginia Davis, Violet S. Cox, Evelyn Koster, Irene O'Rourke, Rosemarie Petelenz, Daniel J. Reehil, Thomas Delaney and Edward L. MacFarlane.

There has been no change in the parties or their attorneys since the commencement of this proceeding, except as hereinabove set forth.

10

Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

In the Matter of the Application

of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,

11 Petitioners,

against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,

Respondents,

directing them to discontinue a certain school practice,

and

12 HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,

Intervenor-Respondents.

Sirs:

PLEASE TAKE NOTICE that the petitioners above-named hereby appeal to the Appellate Division of the Supreme Court, Second Department, from so much of the final order made in this proceeding

on the 5th day of October, 1959 by the Hon. Bernard S. Meyer, Justice of the Supreme Court, Nassau County, and entered on the same day in the Office of the Clerk of Nassau County, as denies the petition herein, denies petitioners' demand for a jury trial herein, and remands the subject matter of the petition herein to the respondent Board of Education for further proceedings not inconsistent with the opinion of the said Justice.

Dated: New York, October 23, 1959. 14

Yours, etc.

BUTLER, JABLOW & GELLER
Attorneys for Petitioners
Office & P. O. Address
400 Madison Avenue
New York 17, New York

To:

GUNN, NEIER & DAIKER
Attorneys for Respondents
49 Main Street
Port Washington, New York 15

HAHN, HAHN & FORD
Attorneys for Intervenor-Respondents
117 Pennsylvania Avenue
Brooklyn 7, New York

CLERK OF NASSAU COUNTY
Mineola, New York

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Order Appealed From

At a Special Term of the Supreme Court, Part I thereof, held in and for the County of Nassau at the County Court House, Old Country Road, Mineola, N. Y., on the 5th day of October, 1959.

Present:

HON. BERNARD S. MEYER,
Justice.

17

[SAME TITLE]

On reading and filing the Petition herein of Steven I. Engel, Daniel Lichtenstein, Monroe Lerner, Lenore Lyons and Lawrence Roth, verified January 4th, 1959, the answer of the Respondents, William J. Vitale, Jr., Philip J. Freed, Mary Harte, Anne Birch and Richard Saunders, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York, verified February 18th, 1959, and annexed exhibits, and, this Court having by Order dated February 24th, 1959, granted the application of Henry Hollenberg, Rose Levine, Martin Abrams, Helen Swanson, Walter F. Gibb, Jane Ehlen, Ralph B. Webb, Virginia Zimmerman, Virginia Davis, Violet S. Cox, Evelyn Koster, Irene O'Rourke, Rosemarie Petelenz, Daniel J. Rechil, Thomas Delaney and Edward L. MacFarlane to intervene in said proceeding on the issue involving the Constitutions of the United States and of the State of New York only, and on reading and filing the answer of said Intervenor-Respondents verified

18

Order Appealed From 19

February 17th, 1959, and the Board of Regents of the University of the State of New York having sought leave to serve and file a brief *amicus curiae* in said proceeding, and this Court having ordered that such leave be granted, and on reading and filing the reply of Petitioners herein, verified March 2nd, 1959, and said matter having come on to be heard on the 24th day of February 1959 pursuant to Notice of Motion dated January 9th, 1959, and an oral motion having been made by the Petitioners for the amendment of their Petition, and after hearing Butler, Jablow & Geller (William J. Butler, of Counsel), attorneys for Petitioners, in support of said Petition, and Gunn, Neier & Daiker (Bertram B. Daiker and Wilford E. Neier, of Counsel), attorneys for Respondents, in opposition thereto, and Hahn, Hahn & Ford (Porter R. Chandler and Thomas J. Ford, of Counsel), attorneys for Intervenor-Respondents, in opposition thereto, and the Respondents having moved by Notice of Motion dated February 18th, 1959, to dismiss said petition and the Petitioners having demanded a jury trial, and it appearing to this Court from the pleadings and the accompanying papers that no triable issue of material fact is raised thereby, and due deliberation having been had thereon, and upon reading and filing the memorandum opinion of this Court dated August 24th, 1959, and oral application having been made on behalf of all parties for permission to appeal, it is

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21

ORDERED that Paragraph 4 of the petition is deemed amended by inserting at the end thereof the words: "All of the schools referred to in paragraph '2' of this petition are within Union

Free School District Number Nine and under the jurisdiction and control of Respondents.", and the answers of Respondents and Intervenors are deemed answers to the petition as thus amended; and it is further

ORDERED that the motion to dismiss the Petition be and the same hereby is denied; and it is further

ORDERED that the affirmative defenses of the respondent Board to the Petition be and they hereby
23 are dismissed as insufficient in law; and it is further

ORDERED that the demand for jury trial be and the same hereby is denied; and it is further

ORDERED that the Petition be and the same hereby is as a matter of discretion denied; and it is further

ORDERED that the matter be and the same hereby is remanded to the respondent Board of Education for further proceedings not inconsistent with
24 the opinion; and it is further

ORDERED that the application made pursuant to the provisions of Section 1304 of the Civil Practice Act for permission to appeal be and it is hereby granted and the Court hereby directs that any party to this proceeding shall be entitled to appeal from this order.

Enter

B. S. M.,
J. S. C.

25

Petitioners' Notice of Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

In the Matter of the Application

of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH, Petitioners, 26

against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,

Respondents,

directing them to discontinue a certain school practice.

Sirs:

PLEASE TAKE NOTICE, that upon the annexed petition of Steven I. Engel, Daniel Lichtenstein, Monroe Lerner, Lenore Lyons and Lawrence Roth, duly verified the 4th day of January, 1959, the undersigned will move this Court at a Special Term, Part I thereof to be held in and for the County of Nassau at the Courthouse at 33 Willis Avenue, Mineola, New York, on the 24th day of February, 1959 at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard for an order directed against respondents William J. Vitale, Jr., Philip J. Freed, Mary Harte, Anne Birch and Richard Saunders, con- 27

stituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York, and commanding them to discontinue or cause to be discontinued in the schools of the said School District the saying of the prayer designated by respondents as the "Regents'" prayer, now said daily in the said schools following the Salute to the Flag pursuant to a resolution passed by respondents, and granting such other and further relief as may be just and proper in the premises.

Dated: New York, New York,
January 9, 1959.

Yours, etc.,

BUTLER, JABLOW & GELLER,
Attorneys for Petitioners,
Office & P. O. Address,
400 Madison Avenue,
Borough of Manhattan,
New York 17, New York.

To:
WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine of the State of New York,
New Hyde Park,
Long Island, New York.

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Petition, Read in Support of Petitioners' Motion

SUPREME COURT OF THE STATE OF NEW YORK

County of Nassau

[Same Title]

Petitioners, by their attorneys, Butler, Jablow & Geller, for their petition in this proceeding, allege as follows: 32

1. Each of the petitioners is a citizen of the United States of America, a resident of the State of New York in the County of Nassau and the owner of real property in the said County assessed by the tax authorities thereof in a sum exceeding $1,000, and each of the petitioners has within one year previous to the execution of this petition paid taxes upon such assessment.

2. Petitioner Steven I. Engel is the father of 33 Michael Engel, a child of seven years of age who resides with the said petitioner, and pursuant to the provisions of the Education Law attends regularly at the Searingtown School in Albertson, County of Nassau. Petitioner Daniel Lichtenstein is the father of Naomi Lichtenstein, David Lichtenstein, and Judy Lichtenstein, who are ten, twelve and fifteen years of age, respectively, and who reside with said petitioner, and pursuant to the provisions of the Education Law attend regularly at Searingtown School, Albertson, Herricks Junior High School, New Hyde Park, and Herricks

34 *Petition*

Senior High School, New Hyde Park, all in the County of Nassau, respectively. Petitoner Monroe Lerner is the father of Cynthia Lerner, who is seven years of age, and who resides with the said petitioner, and pursuant to the provisions of the Education Law attends regularly at Searingtown School, Albertson, County of Nassau. Petitioner Lenore Lyons is the mother of Jeanne Lyons, David Lyons and Wendy Lyons, who are nine, eleven and thirteen years of age, respectively, and who reside with the said petitioner, 35 and pursuant to the provisions of the Education Law attend regularly at Center Street School, Williston Park, Center Street School, Williston Park, and Herricks Junior High School, New Hyde Park, all in the County of Nassau, respectively. Petitioner Lawrence Roth is the father of Joseph Roth and Daniel Roth, who are ten and thirteen years of age, respectively, and who reside with the said petitioner, and pursuant to the provisions of the Education Law attend regularly at Searingtown School, Albertson, and Herricks Junior High School, New Hyde Park, both in the County 36 of Nassau, respectively.

3. Petitioner Steven I. Engel and his said child are members of the Jewish faith. Petitioner Daniel Lichtenstein and his said children are members of the Jewish faith. Petitioner Monroe Lerner and his said child are members of the Society for Ethical Culture. Petitioner Lenore Lyons and her said children are members of the Unitarian Church. Petitioner Lawrence Roth and his said children are non-believers.

4. Respondents constitute the Board of Education of Union Free School District Number Nine,

New Hyde Park, New York, and are charged with the performance of any and all duties imposed under the Education Law and by the regulations of the Commissioner of Education of the State of New York authorized by the Education Law

5. Petitioners are required by Section 3212 of the Education Law to cause their said minor children to attend regularly upon instruction during the entire term that the appropriate schools or classes are in session, and failure or refusal on the part of petitioners to cause their said minor children so to attend renders petitioners subject to punishment pursuant to the provisions of Section 3212 of the Education Law.

6. On information and belief, on the 8th day of July, 1958, at a special meeting of the Board of Education of the said Union Free School District Number Nine, at which respondents were present, respondents, by majority vote, passed a resolution moved by respondent Mary Harte and seconded by respondent Richard Saunders, that the so-called "Regents'" prayer be said daily in the schools of the said School District and that the Board of Education of the said School District direct Lester Peck, as District Principal of the said School District that the said prayer be instituted as a daily procedure following the Salute to the Flag.

7. The so-called "Regents'" prayer, to which the said resolution referred, is a prayer contained in a Statement of Belief adopted on November 30, 1951 at a meeting of the State Board of Regents of the State of New York, a copy of which Statement of Belief is attached to this petition

and made a part hereof as Exhibit "A". The said prayer reads in full as follows:

> "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."

8. On information and belief, respondents were not required by the said Statement of Belief of the State Board of Regents or by any subsequent order or act of the State Board of Regents or of the Commissioner of Education of the State of New York to institute the said prayer as a daily procedure in the schools of the said Union Free School District Number Nine, but their doing so was entirely voluntary on their part.

9. On information and belief, respondents have directed the said Lester Peck that the said prayer be instituted as a daily procedure following the Salute to the Flag in all of the schools of the said School District, and the said prayer is presently being said daily in all of the said schools as directed.

10. The manner in which the said prayer is said is as follows: Each morning at the commencement of each class in each school in the said Union Free School District Number Nine following the Salute to the Flag, the said prayer is said aloud. The prayer is led by the teacher or by a student selected by the teacher, with the other students joining therein. The prayer is said with hands clasped together in front of the body, fingers extended and pointed upwards in the manner of a supplicant. During the saying of the prayer, no student is permitted to leave the classroom.

11. The saying of the said prayer and the manner and setting in which it is said entails the use of the public school system of the said Union Free School District Number Nine and the time and efforts of the teachers and the staff of the schools in the said School District.

12. Both the saying of the said prayer and the manner and setting in which it is said constitute the teaching of religion and religious practices in a form, manner and setting which is contrary to the religion and religious practices of those of the petitioners who are believers and their said children, and is contrary to the religion and religious practices of a substantial number of other parents of children in the said Union Free School District Number Nine and their children, and, therefore, the saying of the said prayer and the manner and setting in which it is said is offensive to the said parents and children.

13. Both the saying of the said prayer and the manner and setting in which it is said constitute the teaching of religion and religious practices contrary to the beliefs concerning such matters held by the petitioner and his children who are non-believers and by other parents of children in the public schools of the said Union Free School District Number Nine and their said children who are non-believers, and the saying of the said prayer and the manner and setting in which it is said is, therefore, offensive to the said parents and children.

14. Both the saying of the said prayer and the manner and setting in which it is said have necessarily resulted in the exercise of coercion upon the children of petitioners and upon other students in the public schools of the said Union

Free School District Number Nine, to engage, against their will, in the saying of a religious prayer and or to do so in a manner and in a setting which is contrary to the beliefs of the said children and their parents, and is, therefore, offensive to them.

15. Both the saying of the said prayer and the manner and setting in which it is said are sectarian and denominational practices, and favor one or more religions and religious practices over others.

47 16. Both the saying of the said prayer and the manner and setting in which it is said favor the belief in religion over non-belief therein.

17. Both the saying of the said prayer and the manner and setting in which it is said have necessarily resulted in divisiveness among the students in the public schools of the said Union Free School District Number Nine and among their parents, because of the differences in the beliefs of the said students and their parents concerning religion and religious practices.

48 18. The saying of the said prayer and the manner and setting in which it is said violate the prohibition against laws respecting an establishment of religion contained in the First Amendment of the Constitution of the United States and made applicable to the State of New York by the Fourteenth Amendment of the said Constitution.

19. Both the saying of the said prayer and the manner and setting in which it is said also violate the prohibition against laws prohibiting the free exercise of religion contained in the First and Fourteenth Amendments of the Constitution of the United States.

20. Both the saying of the said prayer and the manner and setting in which it is said also violate the guaranty of the free exercise and enjoyment of religious profession and worship without discrimination or preference contained in Section 3 of Article 1 of the Constitution of the State of New York.

21. In causing the said prayer to be said in the public schools of Union Free School District Number Nine, as aforesaid, respondents have exceeded their powers and duties as a Board of Education as provided in Section 1709 of the Education Law.

22. If the Statement of Belief referred to in paragraph "7" of this petition is construed to authorize the action of respondents concerning the saying of the said prayer daily in the schools of Union Free School District Number Nine, the said Statement of Belief violates the First and Fourteenth Amendments of the Constitution of the United States and Article 1 of the Constitution of the State of New York.

23. On or about the 17th day of December, 1958, petitioners each duly demanded of respondents that they discontinue or cause to be discontinued in the schools of the said Union Free School District Number Nine, the saying of the said prayer, as aforesaid, but respondents have failed and refused to do so and their said failure and refusal is illegal and constitutes a dereliction of duty.

24. The discontinuance of the said prayer in the said schools is a non-discretionary duty imposed upon respondents by the Constitution of the United States and the Constitution and the laws of the State of New York.

52 *Petition*

25. Petitioners have no other adequate remedy at law or in equity to secure the redress sought herein.

WHEREFORE, petitioners respectfully request an order directed against respondents William J. Vitale, Jr., Philip J. Freed, Mary Harte, Anne Birch and Richard Saunders, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York, and commanding them to discontinue or cause to be
53 discontinued in the schools of the said School District the saying of the prayer designated by respondents as the "Regents'" prayer, now said daily in the said schools following the Salute to the Flag pursuant to a resolution passed by respondents, and granting such other and further relief as may be just and proper in the premises.

Dated: New York, New York,
January 4, 1959.

DANIEL LICHTENSTEIN
STEVEN I. ENGEL
MONROE LERNER
54 LENORE LYONS
LAWRENCE ROTH

(Verified by petitioners on Janaury 4, 1959.)

Exhibit A, Annexed to Petition

THE REGENTS STATEMENT ON MORAL AND SPIRITUAL TRAINING IN THE SCHOOLS

(Printed as Exhibit A, annexed to affidavit of William J. Vitale, Jr., read in opposition to motion; pp. 28-29, this record.)

Respondents' Answer, Read in Opposition to Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

[SAME TITLE]

Respondents answering the petition herein, by Gunn, Neier & Daiker, their attorneys, allege: 56

First: Deny each and every allegation contained in paragraphs "11", "12", "13", "14", "15", "16", "17", "18", "19", "20", "21", "22", "24", "25" of the petition herein.

Second: Deny any knowledge or information thereof sufficient to form a belief as to the allegations contained in paragraph "1" of the petition except admit that each of the petitioners is a resident of the State of New York, in the County of Nassau. 57

Third: Deny any knowledge or information thereof sufficient to form a belief as to the allegations contained in paragraph "3" of the petition herein.

Fourth: Deny each and every allegation contained in paragraph "5" of the petition except refers to Sec. 3212 of the Education Law for the text and legal effect thereof.

Fifth: The respondents make no specific denial to the allegations contained in paragraph "7" of

58 *Respondents' Answer*

the petition but beg the Court's indulgence in referring to a Supplemental Statement to petitioners' Exhibit "A" unanimously adopted by the State Board of Regents' on March 25, 1955, setting forth the Regents' recommendations for Programs in the schools stressing the Moral and Spiritual Heritage of America, which said Supplemental Statement in toto is attached as Exhibit "B" to the affidavit of respondent William J. Vitale hereto annexed and made a part hereof.

59 Sixth: Deny so much of paragraph "8" of the petition which alleges that the institution of the prayer as daily procedure was entirely voluntary on the part of the respondents and except as specifically denied admit same.

Seventh: Deny the allegations of paragraph "9" except admit that the prayer was directed to be instituted as a daily procedure.

Eighth: Deny the allegations contained in paragraph "10" except admit that the prayer is said
60 aloud each morning at the commencement of each class.

Ninth: Deny the allegations contained in paragraph "23" of the petition except admit that petitioners demanded the discontinuance of the saying of the said prayer, and that respondents have failed and refused to do so.

FOR A FIRST SEPARATE AND DISTINCT DEFENSE, RESPONDENTS FURTHER ALLEGE:

Tenth: That petition fails to state facts sufficient to constitute a cause of action for the relief sought herein.

61

FOR A SECOND SEPARATE AND DISTINCT DEFENSE, RESPONDENTS FURTHER ALLEGE:

Eleventh: That the relief herein sought, in the nature of a proceeding under Article 78 of the Civil Practice Act is not available to petitioners for the reason that the act of the respondents complained of is reviewable by an appeal to the Commissioner of Education and petitioners have failed to avail themselves of such remedy.

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FOR A THIRD SEPARATE AND DISTINCT DEFENSE, RESPONDENTS FURTHER ALLEGE:

Twelfth: That this proceeding has not been commenced within the time prescribed by law under Sec. 1286 of the Civil Practice Act in that the proceeding was commenced more than four months after the adoption by respondents of the act complained of on July 8, 1959.

FOR A FOURTH SEPARATE AND DISTINCT DEFENSE, RESPONDENTS FURTHER ALLEGE:

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Thirteenth: That a declaration of unconstitutionality of the act complained of in the petition is not available to petitioners in a proceeding commenced pursuant to Article 78 of the Civil Practice Act.

FOR A FIFTH SEPARATE AND DISTINCT DEFENSE, RESPONDENTS FURTHER ALLEGE:

Fourteenth: That the relief of injunction as prayed for in the petition is not available to petitioners in a proceeding under Article 78 of the Civil Practice Act.

64 *Respondents' Answer*

FOR A SIXTH SEPARATE AND DISTINCT DEFENSE, RESPONDENTS FURTHER ALLEGE:

Fifteenth: That neither the saying of the prayer nor the institution of the prayer as part of the school procedure as set forth in the petition constitute the establishment of a religion or deny the free exercise and enjoyment of religious worship within the spirit and letter of the meaning of the Constitution of the United States and the Constitution established by "The People of the
65 State of New York, grateful to Almighty God for our Freedom". (New York State Constitution, preamble.)

Sixteenth: The State of New York in furtherance of the public welfare through the exercise of reasonable judgment on the part of the New York State Legislature has prescribed by law that there should be fostered "in the children of the state, moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship" (Education Law, Sec. 801) and has
66 directed school boards to comply therewith.

Seventeenth: The New York State Board of Regents' in furtherance of the legislative prescription, through the exercise of reasonable judgment, has set forth its recommendations as to how such moral and spiritual training in the schools shall be fostered. (Exhibits "A" and "B".)

Eighteenth: Petitioners enjoy no lawful authority to interfere with the saying of the prayer by the children of others under the color of judicial process or otherwise.

67

Nineteenth: The interference with freedom of religion, sought to be established by the petitioners, would be in violation of the Constitution of the United States and of the State of New York.

FOR A SEVENTH SEPARATE AND DISTINCT DEFENSE, RESPONDENTS FURTHER ALLEGE:

Twentieth: That petition is defective in that it fails to allege that the schools attended by petitioners' children as set forth in paragraph "2" are within Union Free School District #9 and under the jurisdiction and control of respondents.

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WHEREFORE, respondents demand that the application of petitioners be denied in all respects and that the petition be dismissed with costs.

GUNN, NEIER & DAIKER,
Attorneys for Respondents,
Office & P. O. Address,
49 Main Street,
Port Washington, New York,

69

(Verified by William J. Vitale, Jr., on February 18, 1959.)

70

Affidavit of William J. Vitale, Jr., Read in Opposition to Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

[SAME TITLE]

---

71 STATE OF NEW YORK)
COUNTY OF NASSAU) SS.:

WILLIAM J. VITALE, JR., being duly sworn, deposes and says:

1. I am the duly elected President of the Board of Education of Union Free School District Number Nine, sometimes called the Herricks School District, situated in the Town of North Hempstead, County of Nassau, State of New York and I am one of the respondents in this proceeding.

72 2. In the petition, it is alleged that the Board of Education of Herricks School District, on July 8, 1958, adopted a resolution providing for the saying of the so-called "Regents'" Prayer as part of the opening exercises in each class room within the District and that by so doing the School Board had exceeded its authority and that its refusal to discontinue the procedure "is illegal and constitutes a dereliction of duty" (Petition, paragraph "23"). This charge, if sustained, constitutes a serious offense warranting the removal of respondents by the State Education authorities.

3. The so-called Regents' Prayer is contained in a statement unanimously adopted by the Board of Regents on November 30, 1951 (Exhibit "A" hereto) and this was supplemented under date of March 25, 1955, by a recommendation, again unanimously adopted by the Regents, for school programs on America's Moral and Spiritual Heritage. (Exhibit "B")

4. As a member of said Board of Education, I was familiar with the recommendations of the Board of Regents regarding said prayer as contained in Exhibits "A" and "B" and, in addition, I was also aware of the opinion of the Commissioner of Education, who on June 10, 1957, in a case brought before him (Decision No. 6310, University of the State of New York, Allen, Commissioner), in which he said: 74

"While formal religion may not be injected into the public schools and while it is a matter for the church and the home, for the religious leaders and the parents of each child, I wish to emphasize that the school system throughout its entire curriculum should and does lay continuous stress upon the moral and spiritual values found in the Ten Commandments and in the other religious precepts which permeate the great declarations of our founding fathers, our State and Federal statutes and the vast body of classical literature taught in our public schools. 75

"The Regents Recommendations for School Programs on America's Moral and Spiritual Heritage," a statement unanimously adopted by the Regents on March 25, 1955, and issued to all schools, contains suggestions for laying such stress. Teaching children the basic values of

76 *Affidavit of William J. Vitale, Jr.*

America's moral and spiritual heritage has never been and must never be separated from the public schools."

5. With two such strong recommendations by the Board of Regents and the statement of the Chief Administrative Officer of the New York State Education Department before me, there was brought before the Herricks Board of Education the adoption of the prayer as part of the
77 daily procedure and on July 8, 1958, a resolution was duly adopted providing for the same. (Exhibit "C".)

6. Upon the adoption of the said resolution of July 8, 1958, regarding the prayer, the Board of Education directed that said prayer shall be said daily in all schools of the District and that no child was to be required or encouraged to join in said prayer against his or her wishes.

7. The School District consists of a Senior High School, a Junior High School and five ele-
78 mentary schools in which approximately 4294 children are pupils and in each of those schools, since their opening in the early part of September 1958, the procedure adopted by the Board of Education as aforesaid has been in force.

8. As of the date of this affidavit, no parent or child has complained to the Board of Education that the above procedure has not been scrupulously carried out and there has been brought to our attention only one instance in which any request has been received asking that a child be excused from joining in the prayer, which request has

been respected; nor has any child directly requested to be excused from joining in said prayer.

9. On the contrary the principals and teachers in the School District have been directed and are following the directions that under no circumstances shall a pupil in any way be made or encouraged to join in the prayer and no teacher has instructed the pupils how they are to hold their hands or otherwise conduct themselves during the saying of the prayer.

80

10. Neither the Board of Education nor the school administration has ever received any indication from either a parent or a child within the School District that any child has sought permission to leave any class room during the saying of said prayer.

11. As a member of the Board of Education of Herricks School District for some years and as a father I am fully conscious of the need for instilling in the youth of today some recognition of the moral and spiritual values which are part of the heritage of this country and of this State. The brief moment of prayer, by those who join in it at the opening of school each day, as prescribed in our School District, cannot help but remind those children, in the words of our State Constitution, that by acknowledging their dependence on God, they may thus "secure" the blessings of Freedom granted by Almighty God.

81

WHEREFORE, deponent prays that petitioners' application be denied.

WILLIAM J. VITALE, JR.

(Sworn to February 18, 1959.)

82 **Exhibit A, Annexed to Affidavit of William J. Vitale, Jr.**

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
Albany

THE REGENTS STATEMENT ON MORAL AND SPIRITUAL TRAINING IN THE SCHOOLS

BELIEF IN and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded.

Our State Constitution opens with these solemn
83 words: "We, the People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, do establish this Constitution."

We are convinced that this fundamental belief and dependence of the American—always a religious—people is the best security against the dangers of these difficult days. In our opinion, the securing of the peace and safety of our country and our State against such dangers points to the essentiality of teaching our children, as set forth in the Declaration of Independence, that Al-
84 mighty God is their Creator, and that by Him they have been endowed with their inalienable rights of life, liberty, and the pursuit of happiness.

We believe that at the commencement of each school day the act of allegiance to the Flag might well be joined with this act of reverence to God: "Almighty God, we acknowledge our dependence upon Thee, and we beg by Thy blessings upon us, our parents, our teachers and our Country."

We believe that the school day thus started might well include specific programs stressing the moral and spiritual heritage which is America's, the trust which our pioneering ancestors

placed in Almighty God, their gratitude to Him from Whom they freely and frequently acknowledged came their blessings and their freedom and their abiding belief in the free way of life and in the universal brotherhood of man based upon their acknowledgment of the fatherhood of their Creator, Almighty God, Whom they loved and reverenced in diverse ways.

We believe that thus constantly confronted with the basic truth of their existence and inspired by the example of their ancestors, our children will find all their studies brought into focus and accord, respect for lawful authority and obedience to law will be the natural concomitant of their growth, and each of them will be properly prepared to follow the faith of his or her father, as he or she receives the same at mother's knee, by father's side, and as such faith is expounded and strengthened for them by his or her religious leaders. 86

We believe that thus the school will fulfill its high function of supplementing the training of the home, ever intensifying in the child that love for God, for parents and for home which is the mark of true character training and the sure guarantee of a country's welfare. 87

We believe that such is the best way of insuring that this Government and our way of life shall not perish from the earth.

We believe that this Statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program.

The foregoing statement of belief was unanimously adopted by the State Board of Regents at its regular meeting on November 30, 1951.

88

Exhibit B, Annexed to Affidavit of William J. Vitale, Jr.

The REGENTS' RECOMMENDATIONS for SCHOOL PROGRAMS on AMERICA'S MORAL & SPIRITUAL HERITAGE

THE REGENTS' RECOMMENDATIONS FOR SCHOOL PROGRAMS ON *AMERICA'S MORAL & SPIRITUAL HERITAGE*

89

Unanimously Adopted *by the* Regents
March 25, 1955

•

THE UNIVERSITY OF THE STATE OF NEW YORK
The State Education Department
Albany

1955

90

Exhibit B 91

THE UNIVERSITY OF THE STATE OF NEW YORK
Regents of the University

WILLIAM J. WALLIN, A.M., LL.D., *Chancellor Emeritus*, Yonkers

JOHN P. MYERS, A.B., D.Sc., LL.D., D.Eng., *Chancellor*, Plattsburgh

EDWARD R. EASTMAN, LL.D., Litt.D., *Vice Chancellor*, Ithaca

WELLES V. MOOT, A.B., LL.B., LL.D., Buffalo 92

MRS. CAROLINE WERNER GANNETT, L.H.D., LL.D., Rochester

ROGER W. STRAUS, Litt.B., LL.D., L.H.D., D.H.L., New York

DOMINICK F. MAURILLO, A.B., M.D., LL.D., Brooklyn

JOHN F. BROSNAN, A.M., LL.B., J.D., LL.D., D.C.L., New York

JACOB L. HOLTZMANN, LL.B., LL.D., D.C.L., New York 93

EDGAR W. COUPER, A.B., LL.D., Binghamton

ALEXANDER J. ALLAN, JR., LL.D., Litt.D., Troy

THAD L. COLLUM, C.E., Syracuse

GEORGE L. HUBBELL, JR., A.B., LL.B., New York

94 *Exhibit B*

AMERICA'S MORAL & SPIRITUAL HERITAGE

On November 30, 1951, the Regents issued their Statement on Moral and Spiritual Training in the Schools, which opened with these words: "Belief in and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded."

In such Statement, the Regents expressed their convictions that such fundamental belief and de-
95 pendence is the best security against the dangers of these difficult days and the adoption of their recommendations the best way of insuring that this Government and our way of life shall not perish from the earth.

Such Statement contemplated the issuance of a Supplemental Statement setting forth the Regents' recommendations for programs in the schools stressing the Moral and Spiritual Heritage of America. This is the Supplemental Statement.

96

In putting such recommendations into effect teachers will be mindful always of the fundamental American doctrine of the separation of church and state, and careful at all times to avoid any and all sectarianism or religious instruction which advocates, teaches or prefers any religious creed. Formal religion is not to be injected into the public school. It is a matter for the church and the home, for the religious leaders and the parents of each child.

Exhibit B 97

FUNDAMENTAL BELIEFS

LIBERTY UNDER GOD • RESPECT FOR THE DIGNITY & RIGHTS OF EACH INDIVIDUAL • DEVOTION TO FREEDOM

The Brotherhood of Man
under the Fatherhood of God

Our Founding Fathers set forth in the Declaration of Independence, with unequaled clarity and simplicity, the fundamental moral and spiritual 98
ideals of this Nation:

> *We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. . . .*

"All men are created equal" is the basic principle of the Brotherhood of Man, and "endowed 99
by their Creator with life, liberty and the pursuit of happiness" is the recognition of the Fatherhood of God, and that these most precious rights come from the Creator and not from the kings, princes or other men. The proposition that "government derives its just powers from the consent of the governed" is a recognition of the dignity, worth and sovereignty of each individual under God and of the concept of the individual as a sovereign citizen who, with his fellow citizens, is master of the state they have created and not its servant.

100 *Exhibit B*

The American people have always been a religious people, believing in God each in accordance with his own conscience. As our Supreme Court well stated, "We are a religious people whose institutions presuppose a Supreme Being."

The Constitution of the State of New York opens with these solemn words: "We, the People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, do establish this Constitution."

101 The Great Seal of the United States has as its symbol for future generations an unfinished pyramid of thirteen steps, representing the thirteen colonies, which pyramid is placed under the eye of God, and the motto, "Annuit Coeptis," meaning "He Has Favored Our Undertaking." This motto is repeated on every dollar bill, and our common coins and stamps carry the words, "In God We Trust."

Our Presidents and other great leaders again and again have recalled to our people their dependence upon Almighty God and their obligations to their fellow men, and the necessity of

102 vigilantly protecting their liberty and their freedom. From the countless stream of quotations we cull the following:

At the Constitutional Convention in Philadelphia, Washington, as Chairman, set the spiritual tone for the sessions when he said: "Let us raise a standard to which the wise and honest can repair. The event is in the hand of God."

When the delegates at the Convention seemed hopelessly in disagreement, Benjamin Franklin, "imploring the assistance of Heaven," said, "I have lived, Sir, a long time, and the longer I live,

Exhibit B 103

the more convincing proofs I see of this truth—that God Governs in the affairs of men."

• • •

Washington, in taking his oath of office at his First Inaugural, said:

> *No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States. Every step by which they have advanced to the character of an independent nation seems to have been distinguished by* 104
> *some token of providential agency; and in the important revolution just accomplished and in the system of their united government the tranquil deliberations and voluntary consent of so many distinct communities from which the event has resulted can not be compared with the means by which most governments have been established without some return of pious gratitude, along with an humble anticipation of the future blessings which the past seems to presage. . . .*

• • • 105

Again, in his Farewell Address, Washington puts his convictions into these enduring words: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."

• • •

Abraham Lincoln at Gettysburg said:

> *Four score and seven years ago our fathers brought forth on this continent, a new nation,*

106 *Exhibit B*

> *conceived in Liberty, and dedicated to the proposition that all men are created equal.*

He added that our soldiers fought and died there so "that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth."

• • •

In another address these were his words:

107 > *Our reliance is in the love of liberty which God has planted in us. Our defense is in the spirit which prized liberty as the heritage of all men, in all lands everywhere. Destroy this spirit and you have planted the seeds of despotism at your own doors.*

• • •

And in one of his last public speeches he uttered the sublime thought:

108 > *With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, . . . to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.*

• • •

In all these expressions Lincoln put into words the spiritual motivations for the sacrifices made not only by the heroes of Gettysburg and the other battles of the Civil War, but also of all Americans who have gone into battle, whether at Lexington, San Juan Hill, the Argonne Forest, Iwo Jima or Heartbreak Ridge.

• • •

Woodrow Wilson, in urging the American people to extend the principles of the Founders of this Republic into the realm of world leadership, said: "I summon all honest men, all patriotic, all forward-looking men to my side. God helping me, I will not fail them, if they will but counsel and sustain me!"

Finally, President Eisenhower brings our national moral and spiritual ideals down to date in these words: "Without God there could be no American form of government, nor an American way of life. . . . Thus the Founding Fathers saw 110
it; and thus, with God's help, it will continue to be. . . . The path we travel is narrow and long—beset with many dangers. Each day we must ask that Almighty God will set and keep His protecting hand over us so that we may pass on to those who come after us the heritage of a free people, secure in their God-given right and in full control of a government dedicated to the preservation of those rights."

Throughout our entire history as a Nation, these Fundamental Beliefs have been our moral and spiritual ideals, our guiding star and our compass in time of storm and trouble. They should 111
be a living part of the lives of all our children.

• • •

Devotion to Freedom

How well this is expressed in these challenging words of Thomas Jefferson: "I have sworn upon the alter of God, eternal hostility against every form of tyranny over the mind of man."

Our freedom of speech and worship and of the press, and to do all things which do not harm others, are highly important, but of even greater

importance is the desire and will of the people to have them and to preserve them. The only way for freedom-loving people to secure the "blessings of liberty to ourselves and our posterity" is eternal vigilance through actions that are in response to the Moral Law. In the words of the Chancellor of the Board of Regents, opening our 1953 Convocation, "Freedom is not free—it must constantly be defended and cared for lest we lose it. That is the price we pay for it. We must re-
113 interpret for our children the initiative, the courage and the faith of the Founding Fathers. We must root deeply in their hearts faith in the unimpeachable dignity of the individual and in the unquenchable spirit of free man."

Stressing Moral & Spiritual Values

We recommend:

First: That periods be set aside at frequent intervals during the school year which will be devoted to the intensive study of the foregoing fundamental and great American documents and
114 pronouncements. The same will give to the student an understanding and appreciation of his role as an individual endowed by his Creator with inalienable rights and as a member of a group similarly endowed; of respect for others, particularly parents and teachers, of devotion to freedom and of reverence for Almighty God. Thus, as we heretofore stated, "the school will fulfill its high function of supplementing the training of the home, ever intensifying in the child that love for God, for parents and for home which is the mark of true character training and the sure guarantee of a country's welfare."

• • •

Exhibit B

Second: The development of moral and spiritual values through all the activities and lessons of the school day and particularly by the good example of the school staff. For instance, sports and games may be used to build a sense of fair play, a willingness to lose a game rather than cheat, a desire to do to others as you would be done by and of striving to build a healthy mind and body. The study of science will develop honest dealing with facts, an open mind for new ideas and a keen alertness for the views and experiences of others, respect for truth and humility as one contemplates the vastness of space, the minuteness of the atom and the reign of law and order in the Universe. Biography will keep before pupils inspired examples of character, and encourage them with "the habitual vision of greatness." Friendship among pupils of interracial groups will constitute a strong bulwark against prejudice and intolerance.

Thus our children, inspired by the example of their ancestors, guided by the faith and love of their parents and encouraged by their spiritually sensitive teachers, will renew in their daily lives America's Moral and Spiritual Heritage:

LIBERTY UNDER GOD • RESPECT FOR THE DIGNITY & RIGHTS OF EACH INDIVIDUAL • DEVOTION TO FREEDOM

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Exhibit C, Annexed to Affidavit of William J. Vitale, Jr.

BOARD OF EDUCATION
UNION FREE SCHOOL DISTRICT No. 9
Town of North Hempstead
New Hyde Park, L. I., N. Y.

PIoneer 2-7800

CERTIFIED EXTRACT FROM MINUTES OF
BOARD OF EDUCATION, UNION FREE SCHOOL
119 DISTRICT No. NINE

of

Meeting of July 8, 1958.

• • •

"Mrs. Harte moved, seconded by Mr. Saunders, that the regents prayer be said daily in our schools. Motion carried by majority vote, Mr. Fried voted "nay".

"The Board of Education gave direction to the District Principal that this be instituted as a daily
120 procedure to follow the Salute to the flag."

• • •

I, FLORENCE ALNWICK, District Clerk of Union Free School District No. Nine, DO HEREBY CERTIFY that the foregoing is a true and correct copy of an extract from the minutes of a meeting of the Board of Education duly called and held on July eighth, nineteen hundred and fifty-eight, at which a quorum was present and acting throughout.

I DO HEREBY FURTHER CERTIFY that said resolution has not been rescinded or revoked.

Exhibit C 121

In witness whereof I have hereto set my hand under seal of District No. Nine, this date of February thirteenth, nineteen hundred and fifty-nine.

Florence Alnwick
FLORENCE ALNWICK,
District Clerk.

SEAL OF THE DISTRICT

Respondents' Notice of Motion 122

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the notice of motion of petitioners herein dated January 9, 1959, the petition attached thereto, verified January 4, 1959, the answer of the respondents verified February 18, 1959, the affidavit of William J. Vitale, Jr., sworn to the 18th day of February 1959, a motion will be made at Special Term Part I of the Supreme Court of the County of Nassau, held at 33 Willis Avenue Mineola, New York, pursuant to Section 1293 of the Civil Practice Act, on the return date of this proceeding, to wit, on the 24th day of February 1959, at 10:00 o'clock in the forenoon of that day or as soon thereafter 123

Respondents' Notice of Motion

as counsel can be heard for an order dismissing the petition herein as a matter of law upon the following grounds:

(a) That the petition is insufficient in law and that it fails to state facts sufficient to constitute grounds for the relief sought therein, nor any relief on the merits;

(b) That the relief sought therein is not available to the petitioners as a matter of law;

(c) That this proceeding was not commenced within the time prescribed by law;

(d) That a constitutional question raised by the petitioners is improperly raised in this type of proceeding.

(e) That the relief sought by way of injunction is not available in this type of proceeding;

and for such other and further relief as to the Court may seem just and proper.

Dated: Port Washington, New York
February 18, 1959

Yours, etc.,

GUNN, NEIER & DAIKER,
Attorneys for Respondents,
49 Main Street,
Port Washington, New York

To:

BUTLER, JARLOW & GELLER,
Attorneys for Petitioners
400 Madison Avenue,
New York 17, N. Y.

Order Permitting Adding of Intervenors as Intervenors-Respondents

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At a Special Term, Part II, of the Supreme Court, State of New York, held in and for the County of Nassau, at 33 Willis Avenue, Mineola, County of Nassau, State of New York, on the 24th day of February, 1959.

Present:

HON. BERNARD S. MEYER
Justice.

128

[SAME TITLE]

The motion of Henry Hollenberg, Rose Levine, Martin Abrams, Helen Swanson, Walter F. Gibb, Jane Ehlen, Ralph B. Webb, Virginia Zimmerman, Virginia Davis, Violet S. Cox, Evelyn Koster, Irene O'Rourke, Rosemarie Petelenz, Daniel J. Reehil, Thomas Delaney, Edward L. MacFarlane for leave to intervene as parties respondents in this proceeding, having come on to be heard, pursuant to order to show cause, now, on reading and filing the order to show cause dated February 18, 1959, the joint and several affidavit of Henry Hollenberg, Rose Levine, Martin Abrams, Helen Swanson, Walter F. Gibb, Jane Ehlen, Ralph B. Webb, Virginia Zimmerman, Virginia Davis, Violet S. Cox, Evelyn Koster, Irene O'Rourke, Rosemarie Petelenz, Daniel J. Reehil, Thomas Delaney, Edward L. MacFarlane, verified the 17th day of February, 1959, the affidavit of Thomas J. Ford, Esq., in support of said motion, verified the 17th day of February, 1959, and proof of service of all thereof, and the affidavit of Bertram B. Daiker, verified

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130 *Order Permitting Adding of Intervenors as Intervenors-Respondents*

the 19th day of February, 1959, consenting to the granting of the motion of the proposed intervenors on the part of the respondent Board of Education and the petition of Steven I. Engel, Daniel Lichtenstein, Monroe Lerner, Lenore Lyons and Lawrence Roth, verified the 4th day of January, 1959 and the answer of the respondent Board of Education, verified the 18th day of February, 1959 and the affidavit of William J. Vitale, Jr. annexed to said answer, verified the 18th day of February,
131 1959 and upon the proposed answer of the proposed intervenors herein, verified the 17th day of February, 1959 and upon all the papers, pleadings and proceedings heretofore had herein, and after hearing Porter R. Chandler, Esq., of counsel, for Hahn, Hahn & Ford, Esqs., attorneys for the moving parties, in support of said motion and Wilford E. Neier, Esq., of counsel, for Gunn, Neier & Daiker, Esqs., attorneys for respondent Board of Education herein, consenting to the granting of said motion and William J. Butler, Esq., of counsel, for Butler, Jablow & Geller,
132 Esqs., attorneys for petitioners in opposition thereto, and due deliberation having been had thereon, and upon filing the opinion of the court, it is,

On motion of Hahn, Hahn & Ford, Esqs., attorneys for proposed intervenors,

ORDERED that this application be and the same hereby is granted in the discretion of the Court and Henry Hollenberg, Rose Levine, Martin Abrams, Helen Swanson, Walter F. Gibb, Jane Ehlen, Ralph B. Webb, Virginia Zimmerman, Virginia Davis, Violet S. Cox, Evelyn Koster, Irene O'Rourke, Rosemarie Petelenz, Daniel J. Reehil, Thomas Delaney, Edward L. MacFarlane

Order Permitting Adding of Intervenors as Intervenors-Respondents 133

are hereby added as intervenor-respondents to the above entitled proceeding on the following conditions:

1. That all of the intervenors be represented in this proceeding by one chief counsel who shall participate in the conduct of the proceeding on behalf of all intervenors.

2. That the intervenors' participation in the proceeding be limited to the merits of the constitutional questions raised under the applicable 134 **provisions of the United States Constitution and the Constitution of the State of New York, and**

3. That in the event petitioners be unsuccessful, no costs or disbursements be granted against them and in favor of intervenors.

Ordered that the caption to this proceeding be and the same hereby is amended to add intervenors as intervenor-respondents to said caption. Said intervenors as parties respondents shall be entitled to be heard in all subsequent proceedings that may be had hereon, and it is further 135

Ordered that the proposed answer of the said intervenors verified the 17th day of February 1959 annexed to and served with the moving papers herein be and the same hereby is deemed served on the petitioners herein simultaneously with the signing of this order, and it is further

Ordered that the oral application of the petitioners for an adjournment of the return day herein is denied.

Settle order on return day February 24, 1959.

Enter

B. S. M.,
J. S. C.

136 **Answer of Intervenor-Respondents**

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

[SAME TITLE]

Respondents, Henry Hollenberg, Rose Levine, Martin Abrams, Helen Swanson, Walter F. Gibb,
137 Jane Ehlen, Ralph B. Webb, Virginia Zimmerman, Virginia Davis, Violet S. Cox, Evelyn Koster, Irene O'Rourke, Rosemarie Petelenz, Daniel J. Reehil, Thomas Delaney and Edward L. MacFarlane, for their answer to the petition herein by their attorneys, Hahn, Hahn & Ford, Esqs., 117 Pennsylvania Avenue, Brooklyn 7, New York, allege as follows:

First: Deny knowledge and information sufficient to form a belief as to each and every allegation contained in paragraphs of the petition
138 designated "1., 2., 3., 6., 8., 9."

Second: Deny each and every allegation of the paragraphs of the petition designated "5., 12., 13., 14., 15., 16., 17., 18., 19., 20., 21., 22., 23., 24., 25."

Third: Deny each and every allegation contained in paragraphs of the petition designated "10." except admit on information and belief that each morning at the commencement of the class in each school in the said Union Free School District Number Nine following the salute to the flag the said "Regents' " prayer is said aloud.

WHEREFORE, respondents pray that the proceeding be dismissed and that they be awarded their costs and disbursements.

HAHN, HAHN & FORD, Esqs.,
Attorneys for Respondents,
Office & P. O. Address,
117 Pennsylvania Avenue,
Brooklyn 7, New York.

(Verified by intervenor-respondents on February 17, 1959.)

Petitioners' Reply

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

[SAME TITLE]

Petitioners, by their attorneys, Butler, Jablow & Geller, for their reply to Respondents' answer in this proceeding:

WITH RESPECT TO THE FIRST ALLEGED DEFENSE IN THE SAID ANSWER:

1. Deny each and every allegation contained in paragraph "Tenth" of the said answer.

142 *Petitioners' Reply*

WITH RESPECT TO THE SECOND ALLEGED DEFENSE IN THE SAID ANSWER:

2. Deny each and every allegation contained in paragraph "Eleventh" of the said answer, except admit that Petitioners have not taken an appeal to the Commissioner of Education in this matter, and allege that the failure to take such an appeal is not a bar to this proceeding.

WITH RESPECT TO THE THIRD ALLEGED DEFENSE IN
143 THE SAID ANSWER:

3. Deny each and every allegation contained in paragraph "Twelfth" of the said answer, and allege that this proceeding has been commenced within the time prescribed by Section 1286 of the Civil Practice Act in that the proceeding was commenced on or about January 22, 1959, within four months after the refusal by Respondents on or about January 6, 1959 of the demand made by Petitioners on or about December 15, 1958 that Respondents discontinue or cause to be discon-
144 tinued the saying of the Regents' Prayer in the public schools of Union Free School District No. 9.

WITH RESPECT TO THE FOURTH AND FIFTH ALLEGED DEFENSES IN THE SAID ANSWER:

4. Deny each and every allegation contained in paragraphs "Thirteenth" and "Fourteenth" of the said answer.

Petitioners' Reply

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WITH RESPECT TO THE SIXTH ALLEGED DEFENSE IN THE SAID ANSWER:

5. Deny each and every allegation contained in paragraphs "Fifteenth" to "Nineteenth", inclusive, of the said answer, except respectfully refer the Court to Section 801 of the Education Law and to Exhibits "A" and "B" annexed to the said answer for the text and legal defect thereof.

WITH RESPECT TO THE SEVENTH ALLEGED DEFENSE IN THE SAID ANSWER: 146

6. Deny each and every allegation contained in paragraph "Twentieth" of the said answer, and allege that the public schools attended by Petitioners' children as set forth in paragraph "2." of the petition herein are within Union Free School District No. 9 and under the jurisdiction and control of Respondents.

WHEREFORE, Petitioners respectfully repeat their request in the petition herein for an order 147
directed against Respondents, and commanding them to discontinue or cause to be discontinued the saying of the Regents' Prayer in public schools of Union Free School District No. 9.

BUTLER, JABLOW & GELLER,
Attorneys for Petitioners,
Office & P. O. Address,
400 Madison Avenue,
New York 17, N. Y.

(Verified by Lawrence Roth on March 2, 1959.)

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Opinion by Meyer, J.

SUPREME COURT

NASSAU COUNTY—SPECIAL TERM, PART I

(Cal. No. 1—2/24/59)

Dated August 24, 1959

[SAME TITLE]

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149 BUTLER, JABLOW & GELLER, ESQS.,
Attorneys for Petitioners,
400 Madison Avenue,
New York 17, New York.

CHARLES A. BRIND, ESQ.,
Attorney for Board of Regents of the University of the State of New York, *Amicus Curiae*,
State Education Building,
Albany, New York.

GUNN, NEIER & DAIKER, ESQS.,
Attorneys for Respondents,
49 Main Street,
150 Port Washington, New York.

HAHN, HAHN & FORD, ESQS.,
Attorneys for Intervenor-Respondents,
117 Pennsylvania Avenue,
Brooklyn 7, New York,
PORTER R. CHANDLER, ESQ.,
THOMAS J. FORD, ESQ.,
Of Counsel.

Does any provision of the United States or New York State Constitution invalidate a school board resolution directing that as a daily procedure, following the salute to the flag, the following

prayer be said in the schools of the district: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country"?

The attempt to find a commonly acceptable prayer is not new. Madison recorded "a project of a prayer, by Governor Livingston, father of the present Judge, intended to comprehend and conciliate college students of every Christian denomination, by a form composed wholly of texts and phrases of Scripture";[1] and Benjamin 152

[1] Letter to Edward Everett, March 19, 1823, reprinted in BLAKELY, AMERICAN STATE PAPERS ON RELIGION (1943), 592. The Governor Livingston referred to was William Livingston, the first governor of New Jersey, who while he lived in New York had been a member of the Committee of Trustees for the Lottery Fund, from which Fund, King's College (now Columbia University) was to be supported. In a series of newspaper articles, Livingston assailed the proposed college as an institution of the established church and pressed for a college under civil direction. He formulated his own plan under which "no religious profession in particular be established" and which would have prohibited any by law relating to religion, except compulsion of church attendance on Sabbath. He 153 urged that "the whole College be every morning and evening convened to attend public prayer * * * and that such forms be prescribed and adhered to, as all Protestants can join in." When his opponents charged that no such prayer could be formulated, Livingston prepared and published in the *Independent Reflector* of Thursday, May 31, 1753, the prayer Madison mentions. It is reprinted in part in PRATT, ANNALS OF PUBLIC EDUCATION IN NEW YORK ... THE FOUNDING OF KING'S (AFTERWARDS COLUMBIA) COLLEGE (1873), 224-225. The history of the controversy is detailed in MAHONEY, THE RELATION OF THE STATE TO RELIGIOUS EDUCATION IN EARLY NEW YORK, 1633-1825 (1941), 74-76.

Franklin wrote his own more generalized version of the Lord's Prayer, with detailed explanation of the reasons for each change.[2] Nor is the problem of prayer in New York public schools novel. In a series of rulings beginning in 1837 and continuing until at least 1909, the Superintendent of Common Schools of the State of New York held that a "teacher might open his school with prayer, provided he did not encroach upon the hours allotted to instruction, and provided that the attendance of the scholars was not ex-
155 acted as a matter of school discipline."[3] The rational of the policy is most clearly stated by Superintendent Spencer, in a decision rendered May 13, 1839,[4] as follows:

> "Both parties have rights; the one to bring up their children in the practice of publicly thanking their Creator for his protection, and invoking His blessing; the other of declining in behalf of their children, the religious services of any person in whose creed they may not concur, or for other reasons
> 156 satisfactory to themselves. These rights are reciprocal, and should be protected equally; and neither should interfere with the other. Those who desire that their children should

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[2] Cousins, In God We Trust (1958), pp. 21-23.

[3] New York State, Education Department, Superintendent of Common Schools, Annual Report 1912-1913, Part 2, pp. 524-532. The quotation is from Orders and Decisions, 6:391, referred to at *ibid.*, p. 532. A decision by Superintendent Randall, dated October 27, 1853 in Matter of Quigley, not abstracted in the Annual Report, held that a teacher could not compel Catholic children to join in prayer or read the Bible.

[4] Orders and Decisions, 8:87, abstracted in *op. cit., supra*, n. 3, at p. 526.

engage in public prayer have no right to compel other children to unite in the exercise, against the wishes of their parents. Nor have those who object to this time, place or manner of praying, or to the person who conducts the exercises, a right to deprive the other class of the opportunity of habituating their children to what they conceive an imperious duty. Neither the common school system, nor any other social system, can be maintained, unless the conscientious views of all are equally respected. 158 The simple rule, so to exercise your own rights as not to infringe on those of others, will preserve equal justice among all, promote harmony, and insure success to our schools. In the present case, the Superintendent thinks the trustees had lawful right to permit the teacher to commence the business of the day by public prayer, with the children of such parents as desired it; and they were also right in directing that such exercises should not take place during school hours, nor form a part of school discipline. 159

"And the teacher should allow the children of all parents who do not desire them to engage in prayer to withdraw from the room, or to absent themselves from it. But if they come into the room before the usual school hours, and choose to remain there during prayer, they must preserve the order and decorum befitting such an occasion."

In 1951 this policy was altered when the Board of Regents adopted a statement of belief recommending the prayer quoted above with the suggestion that "at the commencement of each school day the act of allegiance to the Flag might well

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be joined with this act of reverence to God."[3] Respondent School Board having followed the Regents' recommendation and directed recital of the prayer, the question presented to this court is whether as a matter of power, rather than as a question of policy, it may legally do so? For the reasons hereafter set forth at length, it is concluded that the "establishment" clause of the Constitution does not prohibit the non-compulsory saying of the Regents' Prayer in the public schools, but that the "free exercise" clause
161 requires that respondent Board take affirmative steps to protect the rights of those who, for whatever reason, choose not to participate.

The case arises as an Article 78 proceeding, seeking an order in the nature of mandamus directing the respondent Board of Education of Union Free School District Number Nine, Town of North Hempstead to discontinue use of the prayer. The five petitioners are taxpayers within the district and parents of children in schools of the district. Permission to intervene was asked by sixteen taxpayer-parents who oppose the pe-
162 tition, and intervention was allowed pursuant to C.P.A., §1298, but limited in the Court's discretion to the merits of the constitutional questions under applicable provisions of the United States Constitution and the Constitution of the State of New York. The State Board of Regents did not seek to intervene but asked and without objection was granted leave to file a brief *amicus curiae*. The action of the Board which is questioned is

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[3] *The Regents Statement on Moral and Spiritual Training in the Schools*, adopted November 30, 1951. On March 25, 1955, this statement was supplemented by *The Regent's Recommendations for School Programs on America's Moral & Spiritual Heritage*.

the adoption on July 8, 1958 of a resolution "that the regents prayer be said daily in our schools" and the direction, at the same meeting, by the Board "to the District Principal that this 'be instituted as a daily procedure to follow the Salute to the flag". The respondent Board of Education answered and moved to dismiss on a number of procedural grounds.

THE PROCEDURAL QUESTIONS

First, it is claimed that since the matter "can 164
be adequately reviewed by an appeal to a court or to some other body or officer", to wit—the Commissioner of Education, pursuant to Education Law, §310, C.P.A., §1285(4) precludes consideration of the instant petition. That section, however, is not controlling in a proceeding in the nature of mandamus "to compel performance of a duty specifically enjoined by law",[6] nor even in what would normally be a discretionary matter if a constitutional issue is involved.[7] It is, there-

[6] Matter of Leonard v. Horton, 278 App. Div. 62.

[7] Matter of Ellis v. Dixon, 118 N. Y. S. 2d 815, n.o.r., 165
dismissed for failure to appeal to the Commissioner, an Article 78 proceeding seeking review of the School Board's refusal to permit use of the schoolhouse, normally a discretionary matter. The Appellate Division affirmed, 281 App. Div. 987 (lv. den. 306 N. Y. 981, cert. dism'd 349 U. S. 458) holding that "The proceeding was properly before the court" but that the facts alleged did not show a clear legal right in petitioners or a failure by respondents to perform a duty enjoined by law. The holding accords with the line of cases reviewed in BENJAMIN, ADMINISTRATIVE ADJUDICATION, Vol. IV, pp. 51-54, of which Matter of O'Connor v. Emerson, 196 App. Div. 807, aff'd w.o. 232 N. Y. 561 is illustrative, to the effect that the availability of review by the Commissioner does not bar Article 78 review of action involving an interpretation of a statute and which is in violation thereof.

fore, unnecessary to rule on petitioners' further contention that appeal to the Commissioner is not "adequate."[8]

The Board next points to the fact that its resolution was adopted July 8, 1958, more than four months before the commencement (January 22, 1959) of this proceeding, and says that the proceeding is, therefore, not timely brought. But since what is charged in the petition is a continuing failure to obey the requirements of the Federal and State constitutions, and the proceeding
167 was commenced within four months after the demand for discontinuance, it is within the time allowed by C.P.A., §1286.[9]

Third, the Board argues that a question of constitutionality must be raised in a plenary action rather than a special proceeding. This contention is based on the well-established rule that in a proceeding to review an application addressed to the discretion of an administrative body, petitioner is held to have conceded, for the purpose of the application, the constitutionality of the statute or ordinance under which the body acts.[10]
168 But the application here is one involving performance of a constitutional duty, and that ques-

[8] The argument that the finality of the Commissioner's determination prevents judicial determination of the constitutional question, thus making appeal to the Commissioner inadequate, is no longer valid in view of Matter of Ross v. Wilson, 308 N. Y. 605, and Matter of Ellis v. Allen, 4 App. Div. 2d 343, app. dism'd 4 N. Y. 2d 693, lv. den. 4 N. Y. 2d 674, permitting review, despite Education Law § 310, of a determination of the Commissioner involving a constitutional question.

[9] Matter of Cash v. Bates, 301 N. Y. 258.

[10] Matter of Diocese of Rochester v. Planning Board of Town of Brighton, 1 N. Y. 2d 508, 519, 520.

tion is properly raised in an Article 78 proceeding.[11]

Fourth, the Board objects that petitioners are, in effect, seeking an injunction, which relief is not available in this proceeding. Of course, as the language of Section 1284 ("duty specifically *enjoined* by law") and the name (mandamus) of the former procedure imply, Article 78 procedures encompass relief which might be ordered by a mandatory injunction. That fact alone will not put outside the scope of Article 78 proceedings an action, such as the present one, seeking to compel the Board to obey the command of specific constitutional provisions, and thus within the express language of §1284(3).[12] 170

Finally, it is claimed that the petition is defective and should be dismissed as a matter of law because it fails to allege (a) that the schools attended by petitioners' children are within the school district and under control of respondent Board, and (b) facts which establish that the Board failed to perform a duty enjoined by law. With respect to the alle[illegible]ation of control, petitioners sought at the hearing permission both to reply and to amend their petition and have filed a reply containing the allegation said to be 171

[11] People *ex rel.* Ferguson v. Vroman, 101 Misc. 233, aff'd 180 App. Div. 914, rev. o.g. 222 N. Y. 586; Matter of McCabe v. Voorhis, 243 N. Y. 401; CARMODY-WAIT, Vol. 22, p. 200.

[12] Lewis v. Board of Education, 258 N. Y. 117, 123; CARMODY-WAIT, Vol. 22, p. 187. Matter of Donegan v. Patterson, 4 Misc. 2d 81, cited by the Board, appears distinguishable since no statutory or other duty was referred to.

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missing. Since the petition does not *in haec verba* make the allegation, the Court in the exercise of the discretion with which it is clothed by C.P.A., § 1294, grants the request to amend in order to obviate any question on the point,[13] although the fact is one that will be judicially noticed[14] and, therefore, need not be pleaded or proved.[15] Paragraph 4 of the petition is deemed amended by inserting at the end thereof the words: "All of the schools referred to in paragraph '2' of this
173 petition are within Union Free School District Number Nine and under the jurisdiction and control of Respondents.", and the answers of Respondents and Intervenors are deemed answers to the petition as thus amended.

Whether the petition alleges facts sufficient to establish that the Board failed to perform a duty enjoined by law is largely dependent upon a determination of the constitutional duty imposed. For reasons hereafter set forth at length, it is held that while the Board may authorize, it may not require, the saying of the prayer in question, but that if it does so, it must bring
174 the authorization to the attention of parents of children in the schools, establish a procedure for excusing non-participants not only from saying the prayer but from the room, if they so elect, and take affirmative steps to protect the religious freedom of both non-participants and participants.

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[13] Lake Mahopac Heights, Inc. v. Zoning Board, 119 N. Y. S. 2d 809, n.o.r.

[14] People v. Wood, 131 N. Y. 617; Armstrong v. Cummings, 20 Hun. 313.

[15] Shaw v. Tobias, 3 N. Y. 188; CARMODY-WAIT, Vol. 3, p. 472.

The petition alleges that the Board by resolution directed that the prayer be said as a daily procedure and that it is being said aloud each day in the schools of the district, that the saying of the prayer and the manner and setting in which it is said are contrary to the religious practices of those petitioners and their children who are believers and contrary to the beliefs concerning religion of those petitioners and their children who are non-believers, and that demand has been made for discontinuance of the prayer and refused by respondent Board. What is alleged 176
thus shows violations of constitutional duty in that (1) the Board has required rather than authorized the daily use of the prayer, and (2) the manner of its being said does not protect the rights of non-believers or the religious scruples of all of the believers. What is alleged is a "due process" rather than an "equal protection" question and it, therefore, is not necessary to allege or prove purposeful discrimination in administration of the resolution.[16] While a presumption of constitutionality might, in view 177
of the absence of allegations of fact showing compulsion,[17] warrant the Court in construing the Board's direction as being in fact only an authorization, such a presumption, if one exists in

[16] Matter of Diocese of Rochester v. Planning Board, *supra*, n. 10, at p. 521.

[17] The petition alleges in language substantially the same as that used in the petition in Zorach v. Clauson, 343 U. S. 306, that the saying of the "prayer and the manner and setting in which it is said have necessarily resulted in the exercise of coercion upon the children," but this is a conclusory allegation and does not implicate the Board. See 343 U. S. 306, 311, n. 7, *cf. ibid.* at 321.

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religious cases,[18] cannot supply the missing safeguards which the constitutional privilege of free exercise mandates. The petition states a cause of action, therefore.

The foregoing disposes of all of the Board's defenses except the sixth, which sets up the constitutional right of children other than petitioners' to say the prayer free from interference, and of all procedural questions except petitioners' motion for a jury trial and the determination of petitioners' standing to sue. For reasons here-
179 after set forth the defense is held to be without merit and the motion for jury trial is denied.

Petitioners' standing to sue is established by the *Zorach* case as a matter of both New York[19] and federal[20] law. This results not only from the fact that petitioners are parents of children who are currently attending the schools subject to the program but also from the fact that the prayer and the manner and setting in which it is said are contrary to the beliefs of petitioners and their children.[21] There will have been "actual interference"[22] with the religious freedom of
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[18] See, e.g., Prince v. Massachusetts, 321 U. S. 158, 167, "It cannot be sustained by any presumption of validity."

[19] Matter of Zorach v. Clauson, 303 N. Y. 161. The concurring opinion of Judge Desmond raises objections on the point which clearly do not apply to the instant case. See also Baer v. Kolmorgen, 14 Misc. 2d 1015.

[20] Zorach v. Clauson, *supra*, n. 17, 309, n. 4, which distinguished Doremus v. Board of Education, 342 U. S. 429. Accord: McCollum v. Board of Education, 333 U. S. 203, 206.

[21] Note 66 Harv. L. R. 89, 120.

[22] United Public Workers of America v. Mitchell, 330 U. S. 75, 89.

petitioners and of their children unless they are given notice of and an opportunity to make a conscious choice concerning participation in the prayer, and unless steps are taken to see that their freedom not to participate is respected.

Since it has been suggested that § 801 and § 3204 of the Education Law impose a duty on the Board of Regents, and that respondent Board in requiring the prayer was only carrying out a duty imposed on it by the Regents, the legal status of respondent Board should also be ascertained. 182
The Board of Education of a Union Free School District exists as a separate body corporate.[22] As such it is distinct from the Board of Regents, which heads the Department of Education and which appoints, and at pleasure may remove, the Commissioner of Education.[24] The Commissioner of Education is the chief executive officer of the Board of Regents, enforces the laws relating to education, and carries out the policies of the Board of Regents.[25] Attendance of minors from seven to sixteen years of age upon full time day instruction is compulsory[26] and instruction is required by statute in particular subjects.[27] Neither 183
prayer nor religion is mentioned in the law, except that because of their religious beliefs, children may be excused, under regulations of the

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[23] Education Law, § 1701; Judd v. Board of Education, 278 N. Y. 200.

[24] N. Y. Const., Art. 5, § 4 and Art. 11, § 2; Education Law, §§ 101 and 201.

[25] Education Law, § 305, subd. 1.

[26] *Ibid.*, § 3205. Such attendance may be at a public school or at a private or parochial school which meets the curriculum requirements established by the law. § 3204(1).

[27] *Ibid.*, § 3204, 801-810.

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Regents, from attendance at health or hygiene education[28] and absence for religious observance and education must be permitted under rules established by the Commissioner.[29] The Regents must prescribe courses in patriotism and citizenship which must be attended by all pupils over eight years of age, and in the history and meaning of the Declaration of Independence and the United States and New York Constitutions which must be attended by all pupils in the eighth and higher grades.[30] The contention that respondent
185 Board acted in furtherance of the Regents' directions issued under the foregoing provision cannot be sustained, however, for the provision speaks of "patriotic and civic service" and the fostering of "moral and intellectual qualities" whereas the documents issued by the Regents[31] concern themselves with not only those problems but also "spiritual training". Further, those documents make no reference to the provision and are entitled "Regents Statement" and "Regents' Recommendations", obviously not mandatory prescriptions. Further, the Board's answer, in-
186 sofar as it relies on a direction that no child is to be required to join in the prayer, is inconsistent with such a contention, since the statute is compulsory and the legislature made no provision for exception. Finally, neither the Regents' Statement nor the Board's resolution makes the

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[28] *Ibid.*, § 3204(5).

[29] *Ibid.*, § 3210 (1)(b) and (2)(b).

[30] *Ibid.*, § 801. Respondent relies also on § 1709(5) read together with § 801. Since for the reasons given in the text, § 801 does not impose a duty, § 1709(5) does not either.

[31] *Supra*, n. 5.

distinction that the statute does between children over and under the age of eight years. It follows, therefore, that the Board's resolution, though referring to and inspired by the Regents' Statements, must be considered voluntary and that the Regents' policy and program set forth in those statements are involved in this decision only insofar as they form the background for and are referred to in the action of the Board. In short, what is to be considered is the power of the Board, unsupported by any administrative, legislative or constitutional requirement that it 188
provide spiritual training or adopt the resolution of July 8, 1958.

THE CONSTITUTIONAL QUESTIONS

We are brought then to a determination of the constitutional issues. The question is a close one, and since, as Mr. Justice Holmes observed the "controversies are apt to be fierce in proportion to the nicety of the question",[32] a few general observations are, perhaps, in order. In the first place, a judge's task in such a determination 189
is "never [to] substitute his personal appraisal of the interests at stake, or his personal preference between them * * * [but rather] * * * to decide how those who have passed the 'enactment' would have dealt with the 'particulars' before him, about which they have said nothing whatever."[33] Second, the emotionalism generated by such controversies necessitates careful analysis of the arguments made in order to place them in proper

[32] HOLMES-POLLOCK LETTERS (1941) Vol. I, p. 216.
[33] HAND, THE SPIRIT OF LIBERTY (1952), 216.

perspective, to exclude purely policy matters and to reject *in terrorem* contentions made without substantial basis. Thus, the thesis that the present rate of juvenile delinquency evidences the need for prayer in the schools is a matter of policy and of no weight in determining what constitutional provisions framed in 1789 and 1865 mean.[34] So also while it may validly be argued that the appointment of chaplains by the Congress in 1791 represents a practical construction by the Congress responsible for the First Amendment of its meaning, the fact that the appropriation acts covering the pay of Congressional chaplains has never been held invalid is of no weight, since no citizen has standing to bring an action to prevent such a payment.[35] Again, Franklin's suggestion to the Constitutional Convention of daily prayer as a

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[34] More in point would be the fact that Patrick Henry made the same argument in 1784 in support of the Bill Establishing a Provision for Teachers of the Christian Religion (BRANT, JAMES MADISON, THE NATIONALIST [1948] 344) that the initial passage of the Bill by the Virginia Legislature provoked Madison's famous Memorial and Remonstrance, and that, as a result, the assessment plan which the Bill would have imposed was killed by the next session of the Legislature.

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[35] Elliott v. White, 23 F. 2d 997. Likewise persons with standing may choose not to act for personal reasons, e.g.—Madison though he thought thanksgiving proclamations a "deviation from the strict principle" nonetheless "found it necessary to follow the example of his predecessors." Letter to Edward Livingston, quoted in STOKES, CHURCH AND STATE IN THE UNITED STATES (1950), Vol. I, p. 491, and it is hardly to be expected that the winner of a coveted appointment to one of the armed forces academies, or his parents, will institute action to declare unconstitutional the academy's regulation covering compulsory chapel.

means of breaking its deadlock assumes lesser proportion when it is realized that the suggestion, though seconded, was not adopted by the Convention.[36] Similarly, to be rejected, in view of the essentially different nature of prayer on the one hand from the study of historical fact on the other, is the specter of "Godless" schools in which, if the prayer here involved is not sanctioned, references to God in the Constitution and the Declaration of Independence will not be permitted. In sum, the constitutional line to be drawn can only be determined by an analysis of 194
the fact situation involved, the history of the constitutional provisions, and the holdings (together with but distinct from the language used in stating those holdings) of judicial decisions construing the constitutional provisions (or provisions essentially similar).

The Fact Situation

The facts on which the constitutional determination is to be made encompass those drawn from the answer and answering affidavit as well as 195
from the petition and reply.[37] For purposes of clarification, they are restated as follows: Petitioners are citizens, resident in Union Free School District Number Nine, whose children, pursuant to the Education Law, attend schools run by the District. Petitioners include members of the Jewish faith, of the Society for Ethical Culture, of the Unitarian Church, and one non-believer. The respondent Board on July 8, 1958, by majority

[36] Stokes, *supra*, n. 35, Vol. I, pp. 454-455.

[37] Civil Practice Act, §§ 1291, 1292, 1295, 1296.

vote resolved "that the regents prayer be said daily in our schools" and "gave direction to the District Principal that this be instituted as a daily procedure to follow the Salute to the flag." The prayer referred to, the words of which are set forth at the beginning of this opinion, originated in the Regents Statement on Moral and Spiritual Training in the Schools adopted November 30, 1951, which statement was supplemented by the Regents' Recommendations for
197 School Programs on America's Moral and Spiritual Heritage adopted March 25, 1955.[38] It is said aloud at the commencement of the school day, by each class, in the classroom in the presence of a teacher. Though not specifically incorporated in the Board's resolution, or otherwise publicized, the Board directed that no child was to be required or encouraged to join in the prayer against his or her wishes; only one request that a child be excused from saying the prayer was received in the schools of the district, which request was respected; and no child has directly asked to be excused from joining in the prayer nor has either
198 a parent or a child sought permission for a child to leave the classroom during the saying of the prayer.[39] The saying of the prayer and the man-

[38] Too long to set forth herein at length, but such language therefrom as is directly pertinent will be referred to in later portions of this opinion.

[39] The facts in the noted sentence are drawn from the affidavit of William J. Vitale, Jr., President of the Board. The allegation of paragraph 10 of the petition that "During the saying of the prayer, no student is permitted to leave the classroom," is not inconsistent with the facts thus found, and petitioners have not availed themselves of the opportunity to controvert those facts in a reply affidavit. They are, therefore, taken as true.

ner and setting in which it is said are contrary to the religion and religious practices of those petitioners, and their children, who are believers, and to the beliefs concerning such matters held by the petitioner, and his children, who are non-believers.[40] Petitioners have demanded that the saying of the prayer in the schools of the district be discontinued, which respondents have refused to do.

The Nature of Prayer and of the Instant Prayer 200

The first inquiry to which we are brought by the facts above found is the nature of prayer. The dictionary definitions include: "Act of addressing supplication to a divinity or object of worship; the offering of adoration, confession, supplication, thanksgiving, etc., to a God", "the form of words used in praying", "a form of religious service or worship for public or common use, consisting largely of prayers; as Morning or Evening *Prayer*."[41] The religious nature of 201

[40] The facts found in the noted sentence are drawn from paragraphs 12 and 13 of the petition. While denied by both the Board and the intervenors, religion and beliefs concerning religion are subjective matters into which the Court cannot inquire, United States v. Ballard, 322 U. S. 78, rev. o.g. 329 U. S. 187; Fowler v. Rhode Island, 345 U. S. 67, 70, except, perhaps, to determine whether the beliefs are held in good faith. Neither the Board nor intervenors have denied petitioners' good faith or ask for a trial of the question.

[41] Webster's New International Dictionary (2d Ed., 1948).

prayer was recognized by Jefferson [42] and has been concurred in by theological writers,[43] the United States Supreme Court [44] and state courts [45] and administrative officials,[46] including New

[42] He refused to proclaim a day of thanksgiving on the ground that the First Amendment would be violated by his so doing. In his letter of January 23, 1808 to Rev. Samuel Miller explaining his position, Jefferson stated: "Fasting & prayer are religious exercises. The enjoining them an act of discipline. Every religious society has a
203 right to determine for itself the times for these exercises, & the objects proper for them, according to their own particular tenets; * * *" WRITINGS OF THOMAS JEFFERSON (FORD Ed.) Vol. IX, p. 175.

[43] FOSDICK, MEANING OF PRAYER (1916), 32, describes prayer as "communion with God"; HEILER, PRAYER (1932), 362, concurs in this definition and concludes that "prayer is the center of religion." A medieval proverb tells us that "Prayer without devotion is like a body without a soul", UNION PRAYER BOOK (1940), Vol. I, p. 4.

[44] Fowler v. Rhode Island, *supra*, n. 40, at p. 70: "Sermons are as much a part of a religious service as prayers"; United States v. Ballard, *supra*, n. 40, at p. 87: "the power of prayer * * * deep in the religious convictions of many"; Church of the Holy Trinity v. United States,
204 143 U. S. 457, in which in expounding the thesis that this is a religious nation the Court referred, at p. 471, to "the custom of opening sessions of all deliberative bodies and most conventions with prayer."

[45] Agreeing that prayer is a religious exercise, religious worship, part of religion: Spiller v. Inhabitants of Woburn, 94 Mass. 127; Moore v. Monroe, 20 N. W. 475 (Iowa); State *ex rel.* Weiss v. District Board, 44 N. W. 967 (Wisc.); State *ex rel.* Freeman v. Scheve, 91 N. W. 846 (Neb.); *idem* 93 N. W. 169 (Neb.); Hackett v. Brooksville Graded School Dist., 87 S. W. 792 (Ky.); People *ex rel.* Ring v. Board of Education, 92 N. E. 251 (Ill.); Herold v. Parish Board, 68 So. 116 (La.); State *ex rel.* Finger v. Weedman, 226 N. W. 348 (S. D.).

[46] 1909-1910 Op. Atty Gen.—Wash. 135; 25 Cal. Ops. Atty. Gen. 316 (1955).

York's Commissioner of Education.[47] A Committee of the New York Legislature has agreed.[48]

The Board of Regents as *amicus curiae*, the respondents and the intervenors all concede the religious nature of prayer, but seek to distinguish this prayer because it is based on our spiritual heritage. On this score, they argue that it is established that this is a religious nation, that many examples exist of the religious belief of the Founding Fathers, that the wording of the prayer in invoking "Almighty God", in acknowledging "our dependence upon Thee" and in asking "Thy blessings" is derived from national organic documents, that the prayer is to be said in conjunction with the Pledge of Allegiance and "as an incident to the Pledge of Allegiance ceremony", that it was recommended with the understanding that no child would be forced to say it, and that the recommendation was silent as to requirements respecting attire, posture, gestures and the like.[49] The argument proves too much, both as to "establishment" and "free exercise". If it be

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[47] Matter of Dargin, 72 N. Y. St. Dept. Rep. 27 (1951), which held that a baccalaureate service could not be held in the schools because "a religious service". The decision noted, however, that this was not intended to prohibit the opening and closing of school functions with customary invocation and benediction. The decisions of the Commissioner's predecessor referred to in note 3 *supra* are based on recognition of the religious nature of prayer. 207

[48] BLAU, CORNERSTONES OF RELIGIOUS FREEDOM IN AMERICA (1949), 136ff. recounts a controversy over payment of a legislative chaplain ending in a report in 1832 stating (p. 146) "Prayer is not a civic, but *religious* duty." The provision for payment was repealed the next year.

[49] The burden of the argument is set forth in the Statement and Recommendation referred to in note 5, *supra*, and those documents contain many historical examples.

assumed for the moment that the Constitution prohibits prescription of mode of worship and that, therefore, prayer may not be prescribed, the state's interest in familiarizing students with the religious nature of our heritage would not justify the use of prayer as a vehicle for imparting that knowledge since there are other equally effective and constitutionally uninhibited means of achieving that end. If, on the other hand, the purpose is to inculcate in pupils a love of God,[50] then as
209 we shall hereafter see, as an exercise required of all pupils, it would constitute religious instruction in violation of the "establishment" clause and as a permissive exercise it would, unless it gives positive recognition to the right of any participating child to adopt any posture, use any gesture, wear any attire, use any language, or follow any other practice which his or her own religious beliefs may dictate, violate the "free exercise" clause of the federal and state constitutions, as well as the parent's rights, hereafter discussed, under the due process clause to
210 control the education of his child.

It is, however, also contended that the recognition of prayer is an integral part of our national heritage, and that, therefore, the "establishment" clause cannot have been intended to outlaw the practice in schools any more than from the rest of public life; that is, that prayer in the schools is permissible not as a means of teaching "spiri-

[50] The Statement speaks of the prayer as "this act of reverence to God" and of the school's function of "ever intensifying in the child that love for God, for parents and for home which is the mark of true character training." Of course, respondent Board is not bound by the Statement.

tual values" but because traditionally, and particularly at the time of the adoption of the First and Fourteenth Amendments, this was the accepted practice. With this argument the Court agrees. To spell out the reasons for this conclusion, however, requires reference to history.

THE HISTORY OF THE CONSTITUTIONAL PROVISIONS AND OF PUBLIC EDUCATION

Although the writings of Jefferson and Madison are often referred to on matters of constitutional 212
interpretation, it was Jefferson's view that in such matters one should "recollect the spirit manifested in the debates, and * * * conform to the probable [meaning] in which it was passed",[51] and Madison argued that "It is the sense of the nation, therefore, not the sense of the General Convention, that is to be consulted; and that sense, if not taken from the act itself, is to be taken from the proceedings of the State Conventions & other public indications as the true keys to the sense of the Nation".[52] Unfortunately, as Story pointed out,[53] the varying interpretations presented in such state 213

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[51] Letter of June 12, 1823 to William Johnson, THE WRITINGS OF THOMAS JEFFERSON, (FORD Ed.), Vol. X, p. 231.

[52] Fleet, *Madison's "Detached Memoranda"*, 3 Wm. & Mary Quarterly Hist. Mag. (3rd Ser.) 534, 544. On this ground Maxwell v. Dow, 176 U. S. 581, 601, rejected statements in Senate speeches on the passage of the Fourteenth Amendment offered to prove that the first eight amendments of the Bill of Rights had been incorporated in that Amendment.

[53] COMMENTARIES ON THE CONSTITUTION (1833), 406.

conventions makes them at best uncertain and inconclusive criteria. Generally, then, in construing the constitution, one must look to the history of the times and examine the state of things when the provision in question was adopted.[54]

The history of the adoption of the Fourteenth Amendment has been examined in three exhaustive studies.[55] While they show that Congressman Bingham and Senator Howard in debate indicated the purpose of the Amendment to be to guarantee the personal rights protected by the first eight
215 amendments against state action,[56] the Supreme Court has within the last few months once again refused to adopt this thesis,[57] and in any event these are general references, making no specific allusion to the guarantees concerning religion. The closest such was Bingham's reference, in a

[54] Rhode Island v. Massachusetts, 12 Pet. 657, 723. So in Reynolds v. United States, 98 U. S. 145, the Supreme Court turned to the history of the times to ascertain the meaning of "religion" as used in the First Amendment.

[55] FLACK, ADOPTION OF THE FOURTEENTH AMEND-
216 MENT (1908); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. R. 5; JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT, Illinois Studies in Social Sciences, Vol. 37 (1956).

[56] FLACK, *supra*, n. 55, pp. 80, 84, 86.

[57] Bartkus v. Illinois, 359 U. S. 121, decided March 30, 1959, in which the Court stated (at p. 124): "The relevant historical materials * * * demonstrate conclusively that Congress and the members of the legislatures of the ratifying States did not contemplate that the Fourteenth Amendment was a short-hand incorporation of the first eight amendments making them applicable as explicit restrictions upon the States."

speech accepting his renomination to Congress, to his part in framing the first section of the Fourteenth Amendment, which "he said, placed the golden rule in the Constitution".[58]

If we turn then from constitutional history to the history of the times, we find that by 1868, when the Fourteenth Amendment was ratified, "the separation of public education from Church entanglements, of the State from the teaching of religion, was firmly established in the consciousness of the nation",[59] but that such separation did not extend to the exclusion of prayer or the reading of the Bible from public school routines. While 218
some of the state constitutions then in force contained provisions forbidding sectarian instruction or the use of public funds for denominational

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[58] JAMES, *supra*, n. 55, p. 160. The speech was made August 10, 1866. In it Bingham gave as an example that men in Georgia would not be imprisoned, as they had been in the past, for teaching the Bible. In debate on the bill to implement the Fourteenth Amendment, Bingham was somewhat more specific as to his intentions (Cong. Globe, 42nd Cong., 1st Sess., App. pp. 83-85), 219
but this was on March 31, 1871, long after the amendment had been ratified. Brown v. Board of Education of Topeka, 347 U. S. 483, 490 notes also that there is "little in the history of the Fourteenth Amendment relating to its intended effect on public education."

[59] Mr. Justice Frankfurter, concurring in the McCollum case, *supra*, n. 20, at p. 217. He referred to 1875, when President Grant's speech brought the matter to a head nationally, but it was equally true in 1868. The status of public education at the time the Amendment was adopted is also footnoted in Brown v. Board of Education, *supra*, n. 58, at p. 489, n. 4.

schools, or both,[60] the schools were generally opened with prayer.[61] Massachusetts had a law requiring the reading of the Bible in the schools,[62] and New York's Superintendent of Common Schools had ruled no less than five times that prayer and Bible exercises could be conducted in the schools before school hours, but could not be made compulsory.[63] Only two cases dealing with the Bible in the schools had reached the appellate courts; in both use of the Bible was allowed to
221 continue, in one on the basis of its literary value, in the other, in effect, because the regulation included provision for excuse.[64] The controversy

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[60] The state constitutional provisions and their adoption dates are tabled in O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION (1949), 140ff. and CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES (1919), 180. The latter lists fourteen states with such provision by 1868. Bible reading and prayer may, of course, infringe such a state provision, see cases cited *infra* notes 154-158, and if compulsory will also, as is hereafter demonstrated, violate the First and Fourteenth Amendments.

222 [61] BEALE, A HISTORY OF FREEDOM OF TEACHING IN AMERICAN SCHOOLS (1941), 95.

[62] JOHNSON & YOST, SEPARATION OF CHURCH AND STATE (1948), 33. It should be noted that almost the entire legislature and administration elected in 1854 were Know-Nothings. BILLINGTON, THE PROTESTANT CRUSADE (1938), 412.

[63] *Op. Cit., supra*, n. 3.

[64] Donahoe v. Richards, 38 Me. 379 (1854); Spiller v. Inhabitants of Woburn, *supra*, n. 45 (1866). A Boston Police Court case which attracted wide enough attention to cause its reprinting in separate pamphlet form and in a Pennsylvania legal publication, Comm. on Complaint of Wall v. Cooke, 7 Am. L. Reg. 417 (1859), exonerated from liability for criminal assault a teacher who beat with a rattan stick a Catholic child who refused, on instruction of his father and his priest, to say the Lord's Prayer or repeat the Ten Commandments.

which began in the late 1830's over religion in the schools and public support of parochial schools included as one of its facets mandatory Bible reading and prayers in the schools,[65] the Catholic minority seeking to exclude the Bible and prayer, the Protestant majority strenuously opposing such exclusion. The battle that followed saw the formation in 1864 of the National Association to secure the Religious Amendment to the Constitution, an organization dedicated to having God and the Bible recognized in the Constitution,[66] and the
counter organization of the Liberal League whose 224
demands included the discontinuance of all religious instruction, and particularly use of the Bible in the schools.[67] The climax of the controversy came with President Grant's 1875 address to the Army of the Tennessee inveighing against public support of sectarian schools[68] and his annual message of that year calling for an amendment requiring the states to maintain public schools and forbidding the teaching in them of

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[65] Connors, Church State Relationships in Education in the State of New York (1951), 56. Connors 225
records, at p. 76, that the Catholic Second Plenary Council of Baltimore in 1866 enjoined pastors to keep watch "lest their Catholic children use Protestant versions of the Bible, sing sectarian hymns ,or recite prayers in the schools."

[66] Lardner, *How Far Does the Constitution Separate Church and State*, 45 Am. Pol. Sci. Rev. 110, 120; Blau, *op. cit., supra*, n. 48, at 203.

[67] Blau, *supra*, n. 48, at 208.

[68] Stokes, *supra*, n. 35, sets forth the address (Vol. II, p. 722) and notes the editorial comment of the Catholic World which reported the address, that this meant no support to the then system of common schools, "because they are sectarian."

religious, atheistic or pagan tenets.[69] This was followed in 1876 by the introduction of the Blaine Amendment, which would have incorporated that principle in the federal constitution, and the inclusion in the Republican Party platforms of 1876 and 1880 of planks supporting Grant's position.[70] Although the Amendment was defeated in the Senate, its defeat was apparently not due to opposition to its principle,[71] and was followed by adoption of similar provisions in the constitutions
227 of most, if not all, of the states which did not have such provisions, and in a Congressional requirement that newly admitted states include in their constitutions a provision for maintenance of a school system free from sectarian control.[72]

Notwithstanding the strong current of opinion thus demonstrated, the history of the times shows that it did not extend to the exclusion of the Bible and prayer from the schools. Thus out of the New York phase of the battle came an 1844 Act of the Legislature prohibiting New York City's Board of Education from excluding Bible reading, without
228 note or comment, but prohibiting it from directing

[69] 4 Cong. Rec. 175.

[70] Lardner, *op. cit., supra*, n. 66, at p. 121, where it is also noted that the Democrats affirmed adherence to the principle of separation but opposed the Republican proposal as invading states' rights.

[71] PFEFFER, CHURCH, STATE AND FREEDOM (1953), 131, explains the defeat as partly partisan and partly resulting from the belief that state constitutions adequately dealt with the question. See also Justice Frankfurter concurring in McCollum v. Board of Education, *supra*, n. 20, 219, n. 6.

[72] *Ibid.*, and see O'NEILL and CUBBERLEY, *loc. cit., supra*, n. 60.

which version should be read;[73] its Massachusetts phase required Horace Mann, often referred to as the father of the American public school system, to defend himself against a charge that as Secretary of the state Board of Education, he sought to drive religion from the schools, with the denial "that I have ever attempted to exclude religious instruction from school, or to exclude the Bible from school";[74] its national phases saw the rise of the Know-Nothings and the American Protestant Association, both bitterly anti-Catholic organizations,[75] the ensuing formation of the American Party and the adoption in 1855 by that party of a platform which favored maintenance of undenominational schools but declared that the Bible "should not be excluded from the public schools",[76] and the inclusion in the Senate version of the Blaine Amendment of a specific provision that "This article shall not be construed to prohibit the reading of the Bible in any school or institution".[77] And during all this period, McGuffey's Third Reader, first published in 1837, revised in 1843, 1853, 1878, 1896 and 1901, and widely used in schools throughout the United States over a period of seventy years,[78] included the Lord's

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[73] Laws of 1844, Chap. 320, § 12, which became § 1151 of the Greater New York City Charter and was the subject of Lewis v. Board of Education, *infra*, n. 148.

[74] CULVER, HORACE MANN AND RELIGION IN THE MASSACHUSETTS PUBLIC SCHOOLS (1929), 204; compare PFEFFER, *supra*, n. 71, at 285.

[75] STOKES, *supra*, n. 35, Vol. I., p. 820ff., 833ff.; PFEFFER, *supra*, n. 71, 374ff.; SWEET, THE STORY OF RELIGION IN AMERICA (1930), 394.

[76] GREENE, RELIGION AND THE STATE (1941), 110.

[77] 4 Cong. Rec. 5453, see also Meyer, *The Blaine Amendment and the Bill of Rights*, 64 Harv. L. R. 939.

[78] VAIL, HISTORY OF THE MCGUFFEY READERS (1911).

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Prayer (though in slightly revised form, as a poem), an Evening Prayer and a Child's Hymn. The conclusion is inevitable that in 1868, the "sense of the nation", to revert to Madison's phrase, could not be read as indicating, by ratification of the Fourteenth Amendment, the exclusion of the Bible or of prayer from the public schools.[79]

Is there anything in the history of the First Amendment that might lead to a contrary conclusion? If we look at the history of the period in which Madison introduced his proposed amend-
233 ments, we find that church establishments were still maintained in Massachusetts, Connecticut, New Hampshire, South Carolina and Maryland,[80] that education was largely a matter of church

[79] BUTTS, AMERICAN TRADITION IN RELIGION AND EDUCATION (1950), 137, BATES, RELIGIOUS LIBERTY (1945), 92, and STOKES, *supra*, n. 35, Vol. II, p. 493, record the variations in legal requirements and consequent doubt concerning Bible reading and prayer in the schools. The situation in 1870 is graphically illustrated by the delivery in New York City, and publication in pamphlet form, in that year of sermons for (BOOLE, OUR BIBLE,
234 OUR SCHOOLS AND OUR FLAG, ONE AND INSEPARABLE) and against (SPEAR, THE BIBLE IN THE PUBLIC SCHOOLS) the Bible in the schools, and the publication in that year by a former New York Supreme Court Justice of a book proposing an amendment to the Federal Constitution (HURLBUT, SECULAR VIEW OF RELIGION IN THE STATE), one of his aims being the exclusion of the Bible and prayer from the schools (*ibid.*, at p. 46).

[80] ZOLLMAN, AMERICAN CHURCH LAW (1933) 4, and STOKES, *supra*, n. 35, Vol. I, p. 433 both include South Carolina; PFEFFER, *supra*, n. 71, p. 126, does not. All were multiple establishments. It was not until 1833 that the last establishment, in Massachusetts, was terminated. GREENE, *supra*, n. 76, at p. 94.

schools [81] and that, as would be expected under church aegis, prayer, and indeed religious instruction, were a regular part of school routine.[82] The fact that Madison's fifth proposal, that "No State shall violate the equal rights of conscience" failed of adoption; [83] the various versions through which his fourth proposal, which became the First Amendment, passed; [84] and the language of the final provision that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"; made it clear, 236
and it was early so held,[85] that the First Amend-

[81] The history of colonial education was developed by Mr. Justice Frankfurter in his McCollum concurring opinion, *supra*, n. 20, 213-215, and is also recorded in CUBBERLEY, *supra*, n. 60, at pp. 44, 53; PFEFFER, *supra*, n. 71, at 274; KELLER; ALL GOD'S CHILDREN (1953), 277ff.; BATES, *supra*, n. 79, 210ff.; STOKES, *supra*, n. 35, Vol. II, p. 45ff.

[82] STOKES, *supra*, n. 35, Vol. II, p. 53; LARDNER, *supra*, n. 60, at p. 122; CUBBERLEY, *supra*, n. 60, at p. 28; CONNORS, *supra*, n. 65, at pp. 2-4, 14; PFEFFER, *supra*, n. 71, at p. 278.

[83] DUMBAULD, THE BILL OF RIGHTS AND WHAT IT 237
MEANS TODAY (1957), 46, 207.

[84] DUMBAULD, *ibid.*, 39, 45, set forth the history with appropriate references to the Annals of Congress and the Journal of the Senate, and in separate Appendices reprints the amendments as offered by Madison, as reported by the Select Committee, as passed by the House, as passed by the Senate and as agreed to after conference and finally proposed to the states. See also Perry, SOURCES OF OUR LIBERTIES (1959), 422-425; STOKES, *supra*, n. 35, Vol. I, 538-548; Sullivan, *Religious Education in the Schools*, 14 Law and Cont. Pro. 92, 106ff.

[85] Permoli v. Municipality No. 1 of the City of New Orleans, 3 How. 589, 609, decided in 1845 first applied the principle to the religion provisions. Barron v. The Mayor and the City Council of Baltimore, 7 Pet. 243, decided in 1833, had held that the Bill of Rights was not intended to restrain the states.

ment had no application to the states. The only phase of the history of the Amendment related to prayer was the proposal, made in the Senate, that "Congress shall make no law establishing articles of faith or a mode of worship * * *." The attempt to thus limit the Amendment was rejected, but indicates that even those who sought a limited form of restriction agreed that the prohibition against establishment extended to "mode of worship," which would include prayer. One must conclude from the debates and the history,
239 therefore, that the First Amendment's relationship to prayer was general, in the sense that there should be no compulsion to recite a prescribed form of prayer, rather than specific, in the sense that the then existing routine of prayer should be excluded from the schools.

If we ignore the limits of constitutional history above set forth, and examine into the individual views of the Founding Fathers,[56] we are brought to no different conclusion. Thus, as we have noted above, Franklin both wrote his own version of the Lord's Prayer and suggested the efficacy of daily
240 public prayer to the Constitutional Convention. As concerns Madison, though in later life he changed his views,[57] he was a member of the committee of Congress which arranged for a Con-

[56] Mr. Justice Jackson called such materials "as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh". Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, 634.

[57] In the "Detached Memoranda", he took the position that both legislative and service chaplains were violations of the constitution, but could be considered *de minimus*, Fleet, *op. cit. supra*, n. 52, at 558-560.

gressional Chaplain,[28] and served with Jefferson on the Board of Visitors of the University of Virginia which in its 1822 report and 1824 regulations permitted use of rooms in the main building for religious worship.[29] Jefferson, who thought the prescription of a day of prayer so far a violation of the First Amendment and the reserved powers of the states as to prohibit him from proclaiming a Thanksgiving Day, nonetheless provided in his 1817 draft of a bill to establish a public school system in Virginia only that "no religious reading, instruction or exercise shall be 242
prescribed or practiced, *inconsistent with the tenets of any religious sect or denomination*";[30] and also participated in the adoption (as did Madison) of the 1824 regulations for the University of Virginia providing that "students of the University will be free, and expected to attend

[28] BRANT, JAMES MADISON, FATHER OF THE CONSTITUTION (1950), 272, which however is careful to note that this was in 1789, before there was a constitutional provision.

[29] BUTTS, *supra*, n. 79, at p. 119, which however, notes that on April 21, 1825, Jefferson wrote a letter refusing 243
permission to hold religious services in a University building, which apparently overlooked the 1824 regulations. Madison in an 1824 letter spoke of the use of a public hall for religious exercises which students were free to attend or not as they chose, and said that it presented some difficulties but seemed the best plan of escaping the problem of theological professorships. Brant, *Madison: On Separation of Church and State*, 8 Wm. & Mary Quarterly Hist. Mag. (3rd Ser.) 3, 20.

[30] Italics supplied. The language is from Section 11 of Jefferson's 1817 "Bill for Establishing a System of Public Education", which is reprinted in HONEYWELL, EDUCATIONAL WORKS OF THOMAS JEFFERSON (1931), 235. The bill was not enacted (*Ibid.*, 65).

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religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University at its stated hour".[91] While the strength of view and breadth of vision of Madison's famous Memorial and Remonstrance[92] and Jefferson's Republican Notes on Religion[93] may be considered the core of thought embodied in the First Amendment,[94] there is nothing in any of those documents that indicates an intention on the part of either author to exclude the routine of prayer from the schools,
245 provided only that that routine be not compulsory.

THE DECISIONAL LAW

Since our conclusion must, then, be that neither the sense of the nation, the debates, nor the individual views of the framers proscribe prayer as the ceremonial opening of a school day, we turn to the decisional law. As above noted, the Supreme Court early adopted the position that the
246 First Amendment did not apply to the states; until 1922, it continued to assert this view despite

[91] *Ibid.*, 274.

[92] Which is reprinted in BLAKELY, *supra*, n. 1, at p. 83, and as an appendix to Mr. Justice Rutledge's dissent in Everson v. Board of Education, 330 U. S. 1, 66.

[93] Which reprinted, in 1803, that portion of NOTES ON THE STATE OF VIRGINIA (1784) relating to religion (Query XVII) together with the Act for Establishing Religious Freedom. Both are also set forth in PADOVER, THE COMPLETE JEFFERSON (1943), 673 and 946, and BLAU, *supra*, n. 48, at pp. 74 and 76.

[94] See Lævitan, *Mr. Justice Rutledge*, 34 Va. L. R. 526, 533-535; Reynolds v. United States, *supra*, n. 54 at p. 164.

the passage of the Fourteenth Amendment.[95] It also, within four years after the ratification of the Fourteenth Amendment, decided in the *Slaughter-House Cases*[96] that the privileges and immunities clause of that Amendment did not include the rights set forth in the first eight amendments. Despite repeated assaults on that position, the Court continues to adhere to it.[97]

Nonetheless, both the "free exercise"[98] and "establishment"[99] provisions of the First Amendment are now clearly applicable to the states. Though the early decisions so indicating 248

[95] Prudential Insurance Co. v. Cheek, 259 U. S. 530, decided in that year, held that (p. 543) "* * * neither the 14th Amendment nor any other provision of the Constitution of the United States imposes upon the states any restrictions about 'freedom of speech'".

[96] 16 Wall. 36.

[97] Mr. Justice Stone, in Hague v. C.I.O., 307 U. S. 496, 521, n. 1, refers to over fifty attempts, up to 1935, to upset the rule of the Slaughter-House Cases. Mr. Justice Frankfurter concurring in Adamson v. California, 332 U. S. 46, 61, referred to "the mischievous uses to which that clause would lend itself if its scope were not confined." 249

[98] Meyer v. Nebraska, 262 U. S. 390 (dicta); Hamilton v. Regents, 293 U. S. 245, 261; Cantwell v. Connecticut, 310 U. S. 296, 303; Minersville District v. Gobitis, 310 U. S. 586, 593; Chaplinsky v. New Hampshire, 315 U. S. 568, 571 (dicta); Jones v. Opelika, 316 U. S. 584, rev'd on rehearing 319 U. S. 103; Murdock v. Pennsylvania, 319 U. S. 105, 108; West Virginia State Board of Education v. Barnette, 319 U. S. 624, 639; Prince v. Massachusetts, *supra*, n. 18, at 164 (dicta); Marsh v. Alabama, 326 U. S. 501, 504; Fowler v. Rhode Island, *supra*, n. 40.

[99] Everson v. Board of Education, *supra*, n. 92, at p. 8; McCollum v. Board of Education, *supra*, n. 20, at p. 210; Zorach v. Clauson, *supra*, n. 17, at p. 309.

relied on "free speech" cases and referred to infringement of the "liberty" protected by the due process clause, most of the later cases speak of the "First Amendment, made applicable to the states by the Fourteenth," without spelling out how, and consider and construe the language of the First Amendment as though it were directly applicable. None of the cases makes mention of the limitation implicit in the language of the due process clause: "deprive any person of life, liberty or property, without due process of law."
251 We need not now consider whether every "establishment" would constitute a deprivation of liberty or what leeway the phrase "without due process of law" allows for the exercise of legislative discretion in state "establishment" cases,[100] for the Court has established due process criteria (in other than religion cases to be sure, but which must nonetheless be considered applicable to such cases since the hypothesis is that they arise under the same clause) which must be held to exclude the school-prayer situation.

Thus, the court has held "from the beginning
252 and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the

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[100] Wilkinson, *The Federal Bill of Rights and the Fourteenth Amendment*, 26 Geo. L. J. 439; Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 Wash. U. L. Q. 371; Sutherland, *Due Process and Disestablishment*, 62 Harv. L. R. 1306; Warren, *The New "Liberty" under the Fourteenth Amendment*, 39 Harv. L. R. 431; Note, 67 Harv. L. R. 1016; Corwin, *The Supreme Court as National School Board*, 14 Law & Cont. Pro. 3. Professor Sutherland's views were further expounded before the American Council on Education and are reprinted in its 1957 report: THE STUDY OF RELIGION IN PUBLIC SCHOOLS; see also PFEFFER, *supra*, n 71, at p. 129.

States any of the provisions of the first eight amendments as such." [101] Only those provisions apply which are "implicit in the concept of ordered liberty" [102] and they are applied to prohibit action which is "repugnant to the conscience of mankind" [103] or which violates principles "so rooted in the tradition and conscience of our people as to be ranked as fundamental." [104] While the concept of ordered liberty clearly includes freedom of religion, with respect to both "establishment" and "free exercise", legislative permission for the non-compulsory public recital of 254
prayer cannot be said to be repugnant to the conscience of mankind. Indeed, when one recalls the tradition of prayer in the schools both before and after the inauguration of the public school system, in the Congress [105] and in other "deliberative bodies" and "conventions"; [106] and can point not only to a resolution, passed by Congress on the day after it passed the proposal which became the First Amendment, calling for the designation of "a day of public thanksgiving and prayer" [107] but also to recognition of that tra- 255

[101] Bartkus v. Illinois, *supra*, n. 57, p. 124.

[102] Palko v. Connecticut, 302 U. S. 319, at 325.

[103] *Ibid.*, at 323.

[104] Snyder v. Massachusetts, 291 U. S. 97, 105.

[105] Zorach v. Clauson, *supra*, n. 17, at p. 312.

[106] See Church of the Holy Trinity v. United States, supra, n. 44.

[107] The Senate concurred in the amendments and their being sent to the States on September 25, 1789, ANNALS OF CONGRESS, Vol. I, Col. 88, and concurred in the thanksgiving resolution on September 26, 1789, *ibid.* Col. 90. Objection was made that the resolution covered "a religious matter, and, as such, is proscribed to us", *ibid.*, col. 915. LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK (1906) 491, details the resolution of the Constitutional Convention of 1777, directing that August 27th of that year be observed throughout the state "as a day of fasting, humiliation and prayer".

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dition going back to Plato [108] and Plutarch,[109] one must conclude that due process does not proscribe legislative permission to say a non-compulsory prayer in the schools. "The traditions and habits of centuries were not intended to be overthrown when that [the Fourteenth] Amendment was passed." [110]

That public prayer does not fit the rubric of due process does not, however, dispose of the matter. Since the Court has dealt with the religion problems presented to it as though the First
257 Amendment were directly applicable to the states, we must ascertain the reach of its decisions with respect to prayer in the schools. To do that we must also understand the relationship of the parent and the state to the education of the child.

Meyer v. *Nebraska* [111] invalidated a Nebraska statute that prohibited the teaching of a foreign language in any school below the eighth grade. Holding that the statute denied due process to

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[108] Timaeus: "All men, Socrates, who have any degree of right feeling, at the beginning of every enterprise,
258 whether small or great, always call upon God". GREAT BOOKS OF THE WESTERN WORLD (1952), Vol. 7, p. 447.

[109] AGAINST COLOTES THE EPICUREAN, 31, Sec. 1135E: "a city without temples and without gods, making no use of prayer or oaths or divinations, nor sacrifices to obtain blessings or avert evils, there is no one, nor ever will be who has seen." Quoted by STOKES, *supra*, n. 35, Vol. I, p. 70.

[110] The quotation is from Holmes' opinion in Interstate Consolidated Street Ry. Co. v. Mass., 207 U. S. 79, 87, a due process "property" case which is otherwise not in point. See also Frank v. Maryland, 359 U. S. 360, 371: "* * * what free people have found consistent with their enjoyment of freedom for centuries is hardly to be deemed to violate due process."

[111] *Supra*, n. 98, p. 399.

both teachers and parents, the Court said that the Fourteenth Amendment protected the right "to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Though the end, that all might know English, was desirable, it could not be coerced. *Pierce* v. *Society of Sisters* [112] held invalid, as a denial of due process to both private school operators and parents, an Oregon statute requiring that all children attend public school. The Court's decision made clear that "The State may not standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state * * *." 260

Both the *Meyer* and the *Pierce* cases recognized, however, the right of the state to prescribe a minimum curriculum, and that right has been upheld against the claim of a parent who sought to send his child to a sectarian school where the secular minimum was not taught.[113] The parent's right to control and direct his child has also been held subject to the state's right to require military training at a state university,[114] and to intervene in the interest of health to require that 261

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[112] 268 U. S. 510.

[113] People v. Donner, 199 Misc. 643, aff'd 278 App. Div. 705, aff'd 302 N. Y. 857, app. dism'd 342 U. S. 884. Parents may, however, educate their children at home if curriculum and teaching standards are met. People v. Turner, 277 App. Div. 317.

[114] Hamilton v. Regents, *supra*, n. 98; see also West Virginia State Board of Education v. Barnette, *supra*, n. 98, at 632.

the child be given proper medical attendance,[115] to compel vaccination,[116] or to prohibit the use of young children in evangelical work in violation of the child labor law.[117]

The rule thus to be adduced is that the parent has primary control over his child but that the stat if it acts for the general welfare or the welfare of the child and there is a substantial nexus between the action required and the end sought to be attained, may exercise a paramount control. That is to say, the parent's primary
263 right of control over his child remains subject to the exercise of the state's police power in a proper case.

Investigation of the decisions relating to religious freedom shows that the same rule applies: freedom of religion is a preferred[118] but not an absolute right, upon which the state may impose restrictions if the restrictions are reasonable in relation to the gravity of the danger against which they are intended to protect. Thus the Court in ruling on rights to church lands in Virginia after the revolution, held that the Virginia Constitution
264 did not require abolition of all religious corporations and that "the free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties."[119] Again,

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[115] People v. Pierson, 176 N. Y. 201, cited with approval in Prince v. Massachusetts, *supra*, n. 18, at 167.

[116] Jacobson v. Massachusetts, 197 U. S. 11.

[117] Prince v. Massachusetts, *supra*, n. 18.

[118] "Preferred" in the sense that it is guaranteed by the Bill of Rights. The decisions conflict concerning whether freedom of religion is preferred over other constitutionally guaranteed rights.

[119] Terrett v. Taylor, 9 Cranch 43, 49. The decision rendered in 1815 by Justice Story, is apparently the first touching on religious freedom.

in *Watson* v. *Jones*,[120] in holding legal tribunals bound by decisions of church authority on matters of church law and discipline, the Court recognized "the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights." The proviso was applied in both *Reynolds* v. *United States*[121] and *Davis* v. *Beason*[122] to hold that polygamy is a crime despite religious belief to the contrary. In the latter case in explaining 266
the scope and limitation of First Amendment rights, the court said:

> "The First Amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and 267
> to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. The oppressive measures adopted, and the cruelties and punishments inflicted by the governments of Europe for many ages, to compel parties to conform in their religious beliefs

[120] 13 Wall 679, 728.
[121] *Supra*, n. 54.
[122] 133 U. S. 333.

and modes of worship to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons and enforce an outward conformity to a prescribed standard, led to the adoption of the Amendment in question. It was never intended or supposed that the Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation".[123]

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270 The right thus recognized to adhere to and publicly to express religious beliefs extends to evangelization in the public streets,[124] in the sale of religious tracts,[125] and in public parks,[126] as

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[123] *Ibid.*, 342-343.

[124] Cantwell v. Connecticut, *supra*, n. 98; Jamison v. Texas, 318 U. S. 413; Largent v. Texas, 318 U. S. 418; see Kunz v. New York, 340 U. S. 290.

[125] Jones v. Opelika, 319 U. S. 103; Murdock v. Pennsylvania, *supra*, n. 98; Follett v. Town of McCormick, 321 U. S. 573.

[126] Fowler v. Rhode Island, supra, n. 40; Niemotko v. Maryland, 340 U. S. 268. The latter decision was based on equal protection rather than religious freedom, however.

well as in a company town.[127] In the field of education, it permits the Congress to expend Indian trust funds for the religious education of the Indians since otherwise their freedom of religion would be violated,[128] permits a Jehovah's Witness child to attend school despite a refusal to salute the flag,[129] permits a parent to demand the release of his child for a religious holiday,[130] or, at least, is not violated when release is granted for such holidays.[131] It also is not violated when the Congress recognizes the religious scruples of conscientious objectors by exempting them from the 272
draft,[132] although clearly such an exemption is a matter of grace and not of constitutional requirement.[133] It does not, however, even on religious grounds, permit withdrawal of children from school in the face of a statute requiring attendance until age 16,[134] nor, as we have seen, sanction violation of a child labor ordinance, the refusal to give instruction in the minimum curriculum re-

[127] Marsh v. Alabama, 326 U. S. 501.

[128] Quick Bear v. Leupp, 210 U. S. 50.

[129] West Virginia State Board of Education v. Barnette, 273
supra, n. 98. The decision overruled Minersville District v. Gobitis, *supra*, n. 98, which had held the governmental interest in maintaining national unity paramount.

[130] Zorach v. Clauson, supra, n. 19, at p. 173. Compare, however, Ferriter v. Tyler, 48 Vt. 444 holding that a Catholic child could be expelled for refusal to attend on Corpus Christi Day, and Commonwealth v. Bey, 166 Pa. Sup. 136, upholding the conviction for violation of the compulsory education law of a Mohammedan parent who kept his child out of school on Friday.

[131] Zorach v. Clauson, *supra*, n. 17, at p. 313.

[132] Selective Draft Law Cases, 245 U. S. 366.

[133] United States v. Macintosh, 283 U. S. 605, 623.

[134] Commonwealth v. Beiler, 168 Pa. Sup. 462.

quired by statute, nor refusal to take a course in military science at a state university.

If we turn our attention to the "establishment" clause, we find that the Court has held that there is no constitutional impediment to Congressional repeal of a charter granted under territorial law to the Mormon Church,[135] that the draft exemption of conscientious objectors is not the making of a law respecting an establishment,[136] and that the Amendment does not proscribe a contract between the Government of the District of Columbia and a
275 hospital run by an order of Catholic Sisters but incorporated as a separate entity.[137] Its most important decisions on the subject, however, were in the field of education,[138] in *Everson* v. *Board of Education*,[139] *Illinois ex rel. McCollum* v. *Board of Education*[140] and *Zorach* v. *Clauson*.[141]

The *Everson* case held that a statute authorizing reimbursement of parents for expenditures for bus transportation of their children to school, including Catholic parochial schools, did not constitute an establishment, its purpose being merely to provide safe transportation and thus protect
276 the general welfare. The decision included the now famous dictum that:

> "The 'establishment of religion' clause of the First Amendment means at least this:

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[135] Mormon Church v. United States, 136 U. S. 1.

[136] Selective Draft Law Cases, *supra*, n. 132.

[137] Bradfield v. Roberts, 175 U. S. 291.

[138] Hamilton v. Regents, *supra*, n. 98, concerned education and includes a dictum by Mr. Justice Cardozo that requiring military instruction at a state university does not violate the "establishment" clause.

[139] *Supra*, n. 92.

[140] *Supra*, n. 20.

[141] *Supra*, n. 17.

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious 278
> activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'." [142]

The *McCollum* case relied upon that dictum to in- 279
validate a released time system under which pupils whose parents signed permission cards were given thirty or forty-five minute periods of religious instruction on public school premises during school hours by teachers employed by religious organizations though subject to the approval of the public school superintendent. Non-participating chil-

[142] *Supra*, n. 92, at pp. 15-16. It had earlier been decided in Cochran v. Louisiana State Board of Education, 281 U. S. 370, that a state could make secular textbooks available to both public and parochial schools, but the First Amendment issue was not raised in that case.

dren attended a regular class or a study hall during the released time period. The majority opinion refused to accept the argument that the First Amendment forbids only preference of one religion over another, not impartial governmental assistance to all, and held that since public buildings were being used for religious instruction and the state's compulsory education system was used to help provide pupils for the program of instruction carried on by the separate religious sects, the pro-
281 gram was unconstitutional. A concurring opinion, written by Mr. Justice Frankfurter, reviewed the history of education in colonial times and through the period in which the Fourteenth Amendment was adopted and concluded that separation of the state from the teaching of religion was the accepted principle, and that, by permitting such teaching on school time and property, pressure was put upon children to attend, and a feeling of separation was engendered. Only Justice Reed dissented.

The final decision, *Zorach v. Clauson*, was ren-
282 dered four years later. During the intervening period a storm raged in legal and educational fields over the *McCollum* ruling.[13] The *Zorach* decision upheld the New York released time system. The court held that the First Amendment does not require separation in every respect, the question in each case being one of degree. It emphasized the religious nature of our people and said that to refuse to accommodate the public service to their spiritual needs would be to prefer non-believers over believers. It pointed out that,

[13] See Mr. Justice Black's dissent, 343 U. S. at 317 and his notes 1 and 2.

since the children were released for instruction outside the school, neither religious instruction nor expenditure of public funds was involved and added that there was no evidence that coercion was in fact being used to force or persuade students to take religious instruction. Holding that

> "government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. * * * It may not coerce anyone 284
> to attend church, to observe a religious holiday, or to take religious instruction",[144]

the Court concluded that a system whereby the public schools do no more than accommodate schedules to a program of outside religious instruction does not violate the Amendment.

The *Zorach* decision constitutes a retreat from both *Everson* and *McCollum* where *Everson's* broad dictum, reaffirmed in *McCollum*, outlawed aid to all religions, *Zorach* recognized that government can, without violation, accommodate all re- 285
ligions; where *McCollum* invalidated an alliance between religion and the compulsory education system, *Zorach* upheld the same alliance, for the same purpose, though in a different place. The *Everson* holding, that the expenditure of tax funds for a general welfare purpose was not invalidated because religious groups also benefited, was extended by *Zorach* to validate minimal [145] use of the

[144] 343 U. S. at 314.

[145] The Court noted both that the cards were printed by the religious organizations (p. 309) and that the school's truancy system was not used to enforce attendance (p. 311, n. 6).

tax supported school system for a religious purpose, as an accommodation of the spiritual needs of our people. The *McCollum* holding, that religious instruction as a part of a compulsory school system is unconstitutional without regard to whether actual compulsion operates[146] was adhered to, but the fact situation in *Zorach* was held sufficiently different in degree to warrant sanction of the accommodation. This would appear to be the reverse side of the "free exercise" coin: "establishment" prohibits any compulsion in matters
287 of religion that operates directly on the individual, but prohibits indirect compulsion (as through the use of general tax funds for a religious purpose) only if the nexus between government and religion thus produced is too close. The democratic nature of our government precludes the imposition of sanctions in the field of religion; the religious nature of the governed sanctions the inclusion of religion in the processes of democratic life; the dividing line between permitted accommodation and proscribed compulsion is a matter of degree, to be determined anew in each new fact situation.

288 Despite an apparent contradiction in terms, the First Amendment's "establishment" and "free exercise" clauses clearly protect the nonbeliever as well as the believer in God. This is

[146] The Court found it unnecessary, in view of its conclusion, to consider whether actual pressure existed. 333 U. S. 203, 207, n. 1. The trial court had found as a fact that it did not, SUTHERLAND, *supra*, n. 100, 62 Harv. L. R. 1306, 1313, citing McCollum Record, p. 69. The court did not emphasize the sectarian nature of the instruction, though Justice Douglas, in AN ALMANAC OF LIBERTY (1954), 261, calls the use of public school rooms and machinery for such instruction "the fatal feature".

borne out by decisions of the Supreme Court, by utterances of the Founding Fathers and by a provision of the Constitution itself. Thus the *Everson* decision states that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers",[147] the *McCollum* ruling protected the rights of an atheist, and the *Zorach* decision, by refusing to prefer "those who believe in no religion over those who do believe",[148] recognized but refused priority to the non-believer's right. 290
The principle thus stated is implicit in the provision of Article VI of the United States Constitution that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States". It also was the point of view of Jefferson and Madison. Thus, Jefferson stated in his Republican Notes on Religion[149] that "it does me no injury for my neighbor to say there are twenty Gods, or no God" and Madison incorporated in the fourth point of his Memorial and Remonstrance the statement that: 291

[147] 330 U. S. at p. 18.

[148] 343 U. S. at 314. The principle was also recognized in the Gobitis case, *supra*, n. 98, at p. 593, in Plywacki v. United States, 205 F. 2d 423, which reversed, on the government's confession of error, the District Court's refusal to naturalize an atheist, in Lewis v. Board of Education, 157 Misc. 520, 526, mod. 247 App. Div. 106, app. dism'd 276 N. Y. 490 and in Matter of Lewis v. Allen, 5 Misc. 2d 68.

[149] *Supra*, n. 93. See also his Notes on Locke, reprinted in THE PAPERS OF THOMAS JEFFERSON (Boyd Ed.) Vol. I p. 548.

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> "Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us."

Indeed, the only suggestions to the contrary are the statement, in the course of debate on the First Amendment, by Representative Huntington, that he hoped that the Amendment would be made in
293 such a way as to secure rights of conscience "but not to patronize those who professed no religion at all",[150] and a concurring opinion stating that freedom "of" religion does not mean freedom "from" religion.[151] The opinion's apothegm is true only in a most limited sense. Every individual has a constitutional right personally to be free from religion, but that right is a shield, not a sword, and may not be used to compel others to adopt the same attitude. Mr. Huntington's remark may be construed as suggesting merely that non-believers are not to be preferred over
294 believers. To the extent that it may be read as suggesting that non-believers have any lesser rights, it is inconsistent with the views of Madison and Jefferson referred to above and with the fact that, at the time that it was uttered, less than twenty percent of the population of New England (the best churched section of the colonies)

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[150] Annals of Congress, Vol. I, Col. 731; see also STOKES, *supra*, n. 35, Vol. I, p. 543.

[151] Gordon v. Board of Education, 178 P. 2d 488 (Cal. Dist. Crt. App.), review denied by the California Supreme Court, see 78 Cal. App. 2d 464; see PFEFFER, *supra*, n. 71, at p. 341.

had any formal connection with organized religion.[152] Such an isolated statement, nowhere shown to have been brought to the attention of those who ratified the Amendment, cannot be considered the "sense of the nation".

The principles of decisional law so far considered have been stated in federal cases concerned with the United States Constitution. Except for the few incidental references to prayer hereinbefore noted, however, nothing in those cases has related to prayer in the schools 296
or the closely kindred subject of the Bible in the schools.[153] Before attempting to apply the rules so far adduced to the fact situation of the present case, state decisions relating to prayer, the Bible and baccalaureate services must be considered.

The use of prayer in the schools either separately or together with the Bible has been upheld

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[152] SWEET, RELIGION IN COLONIAL AMERICA (1942), p. 335; see also STOKES, *supra*, n. 35, Vol. I, p. 229 which cites an article by Sweet giving the overall figure as one in eight, and another by Davis putting the ratio at one in 297
twenty to twenty-five; and COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA (1902), 16.

[153] Doremus v. Board of Education, *supra*, n. 20, dismissed for want of standing an appeal from a judgment upholding reading of the Bible in New Jersey schools; Tudor v. Board of Education, 348 U. S. 816, denied *certiorari* with respect to a New Jersey judgment holding unconstitutional the distribution of Gideon Bibles through the schools; Washington *ex rel.* Clithero v. Showalter, 284 U. S. 573, dismissed appeal with respect to a judgment holding that the schools could not be required to hold opening Bible reading exercises. The Bible question under a compulsory statute is now before a three-judge federal court in Philadelphia for decision, in Schempp v. School District of Abington Township, New York Times, March 13, 1959, p. 14, Col. 2.

in ten [154] and struck down in seven [155] state decisions. Of the cases concerned solely with the reading of the Bible, nine [156] have upheld and two [157] have struck down Bible reading as a devotional exercise.[158] It has also been held that

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[154] Spiller v. Inhabitants of Woburn, *supra*, n. 45; Moore v. Monroe, *supra*, n. 45; Billard v. Board of Education, 76 Pac. 422 (Kan.); Church v. Bullock, 109 S. W. 115 (Tex.); Hackett v. Brooksville Graded School District, *supra*, n. 45; Knowlton v. Baumhover, 166 N. W. 202
299 (Iowa); Wilkerson v. City of Rome, 110 S. E. 895 (Ga.); Doremus v. Board of Education, 75 Atl. 2d 880 (N. J.), app. dism'd 342 U. S. 429; Commonwealth v. Renfrew, 126 N. E. 2d 109 (Mass.); Carden v. Bland, 288 S. W. 2d 718 (Tenn.). Cases such as North v. Board of Trustees, 27 N. E. 54 (Ill.) upholding compulsory chapel at a state university are not included since a college education is not compulsory.

[155] State *ex rel.* Freeman v. Scheve; People *ex rel.* Ring v. Board of Education; Herold v. Parish Board, all *supra*, n. 45; State *ex rel.* Conway v. District Board, 156 N. W. 477 (Wisc.) (dicta); State v. Weedman, *supra*, n. 45; 1909-1910 Op. Atty. Gen.—Wash. 135; 25 Cal. Ops. Atty. Gen. 316 (1955).

[156] Donohoe v. Richards, *supra*, n. 64; Hart v. School
300 District, 2 Lanc. L. R. 346; Nessle v. Hum, 1 Ohio N. P. 140; Stevenson v. Hanyon, 4 Pa. Dist. Rep. 395; Curran v. White, 22 Pa. Co. Crt. Rep. 201; Pfeiffer v. Board of Education, 77 N. W. 250 (Mich.); Kaplan v. Independent School District, 214 N. W. 18 (Minn.); People *ex rel.* Vollmar v. Stanley, 255 Pac. 610 (Colo.); Lewis v. Board of Education, *supra*, n. 148.

[157] State *ex rel.* Weiss v. District Board, 44 N. W. 967 (Wisc.); State *ex rel.* Dearle v. Frazier, 173 Pac. 35 (Wash.).

[158] Use of the Bible generally for other than sectarian instruction was permitted in State *ex rel.* Freeman v. Scheve, *supra*, n. 45, and People *ex rel.* Vollmar v. Stanley, *supra*, n. 156, and its use as a library book was sanctioned in Evans v. Selma Union High School Dist., 222 Pac. 801 (Cal.).

a school board may not be required to hold Bible reading exercises,[159] that school baccalaureate services and graduation exercises may be held in a church,[160] that the school system may not be used as a means of distributing religious pamphlets or Gideon Bibles,[161] and that a Board of Education may not display in the classrooms of its schools a plaque purporting to set forth the Ten Commandments.[162] Most of the above decisions have been made under state constitutional provisions prohibiting sectarian teaching. They conflict concerning whether the Bible or the Lord's Prayer 302
is sectarian. Many of the cases upholding such practice have pointed to the fact that the regulation involved did not make it compulsory;[163] but regulations permissive in terms have been struck

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[159] Board of Education, City of Cincinnati v. Minor, 23 Ohio 211; State *ex rel.* Clithero v. Showalter, 293 Pac. 1000 (Wash.), appeal dismissed 284 U. S. 573.

[160] State *ex rel.* Conway v. District Board, *supra*, n. 155; Miller v. Cooper, 244 Pac. 2d 520; compare Matter of Dargin, *supra*, n. 47.

[161] Miller v. Cooper, *supra*, n. 160; Tudor v. Board of Education, 100 Atl. 2d 857 (N. J.) cert. den. 348 U. S. 816. 303

[162] Matter of Behman, 78 N. Y. St. Dept. Rep. 10. The version used was drawn from all but would have conformed to none of the versions used by the different faiths.

[163] Moore v. Monroe, Hackett v. Brooksville Graded School Dist., both *supra*, n. 45; Church v. Bullock, Wilkerson v. City of Rome, both *supra*, n. 154; Hart v. School District; Pfeiffer v. Board of Education; People *ex rel.* Vollmar v. Stanley; Kaplan v. Independent School Dist., all *supra*, n. 156.

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down because of the compulsion and discrimination involved in having to ask to be excused.[164]

Most of the decisions make no reference to the First and Fourteenth Amendments, a few make passing reference to them but rest decision primarily on state provisions,[165] only four discuss the effect of the Amendments.[166] *People* v. *Stanley* held that under the Fourteenth Amendment children cannot be compelled, against their parents' wishes, to take instruction not essential to good citizenship and that since the morality of the Bible
305 could be taught by other methods, Bible reading was not essential and, therefore, could not be made compulsory. It then discussed, as a state constitutional question "with which the United States Constitution has nothing to do," whether

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[164] State *ex rel.* Weiss v. District Board, *supra*, n. 157; People *ex rel.* Ring v. Board of Education; Herold v. Parish Board, both *supra*, n. 45; Tudor v. Board of Education, *supra*, n. 161; see Knowlton v. Baumhover, *supra*, n. 154.

[165] Commonwealth v. Renfrew, *supra*, n. 154, contained a footnote reference to McCollum, *supra*, n. 20, and Zorach,
306 *supra*, n. 17; Carden v. Bland, *supra*, n. 154, found Everson *supra*, n. 92, and McCollum irreconcilable and based the decision primarily on State provisions; Miller v. Cooper, *supra*, n. 160, referred to McCollum, Doremus, *supra*, n. 154, and Zorach, but said they were not helpful in reaching a decision; Lewis v. Board of Education, *supra*, n. 148, p. 528, said the Greater New York Charter provision in question, section 1151, could not violate the Federal Constitution because it contained the proviso that nothing herein "shall be so construed as to violate the rights of conscience, as secured by the constitution of this State and of the United States."

[166] People *ex rel.* Vollmar v. Stanley, *supra*, n. 150; Doremus v. Board of Education, *supra*, n. 20; Tudor v. Board of Education, *supra*, n. 161, and a 1955 California Attorney General's Opinion, *supra*, n. 46.

Bible reading had to be excluded altogether. It concluded that non-compulsory reading of the Bible without comment was not sectarian, though the conclusion might be different if it were shown that sectarian sections of the Bible were read, and issued a writ requiring revocation of the order of compulsory attendance. *Doremus* v. *Board of Education* held that under the applicable statute the practice of reading the Bible and reciting the Lord's Prayer was permissive and not compulsive; that the sense of the First Amendment does not prohibit the recognition of God; and that the 308
practice did not constitute sectarian instruction or worship or set up religious instruction or religious worship in aid of one or more religions or constitute the establishment of religion or prohibit the free exercise of religion. *Tudor* v. *Board of Education*, decided by the same court, struck down the distribution of Gideon Bibles through the schools. The decision reviewed the history of the adoption of the First Amendment, and the religious motivation of the colonists, and held that the distribution of the New Testament constituted a religious preference in violation of the First 309
Amendment. It distinguished the *Doremus* ruling and held the Gideon Bible to be a sectarian book. It further held that the practice involved could not be viewed as merely an accommodation, particularly in view of the testimony of psychiatrists that the effect of distribution under the authority of the school would be to create a subtle pressure on the child and to create tensions among religious groups. Finally, the Attorney General of the State of California has held that the First Amendment prohibits recitation of a prayer identical

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with the prayer involved in the instant case except that in place of the word "parents" it substituted the word "home". His decision reviewed the federal cases and concluded that a public school teacher may not be required to participate in such a prayer exercise [167] and that, in any event, the use of the prayer would be unconstitutional as a violation of the rights of the children of atheist and agnostic parents. To require the children to participate in prayers contrary to the belief of their parents would, he held, be a material en-
311 croachment on the separation of church and state, and the right to be absent he considered an inadequate protection from the very real, though subtle, pressure which the endorsement of school and teacher would produce upon the child.

How do the above decisions and the principles to be drawn from them affect the instant case? The *Zorach* case holds that the Constitution does not require separation in every and all respects and, as we have seen, constitutional history confirms a tradition of prayer, including prayer in the schools. Even without the constitutional his-
312 tory, some form of prayer would appear to fall within the realm of permissible accommodation. Despite the Board's "spiritual heritage" argument, the prayer under consideration cannot be deemed religious instruction. It is recited during opening exercises rather than as a part of any instructional period. It is phrased in traditional prayer form rather than in any form normal for instructional materials. Essentially, it is devotional and, as such, is designed to be repeated

[167] A question not involved in the instant case since no teacher has objected.

daily, without change, over a twelve-year school course. Twenty-two words in length, and thus taking substantially less than one minute to recite and a good deal less time for recitation than does the legislative prayer deemed by *Zorach* to be within permissible constitutional degree, the instant prayer, at least when its recitation is limited to daily exercises at the opening of school, must be classified as outside *McCollum's* proscription of religious instruction and within *Zorach's* sanction as an accommodation.[168]

As *Zorach* recognizes, however, the prayer exercise would nonetheless be objectionable if there were direct compulsion. The Board's resolution of July 8, 1958, is framed in mandatory terms. While the answering affidavit states that direction has been given that no child shall be coerced or in any manner persuaded to participate, there is no indication that either the resolution or the direction has been brought to the attention of either the parents or the children. This is not a situation, such as pertained in the *Zorach* case, where prior parental consent has been obtained. In view of that fact and in view of the fact that a school child cannot be expected to understand that a resolution phrased in mandatory terms

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[168] Compare Baer v. Kolmorgen, *supra*, n. 19, which approved as an accommodation the display of a crèche on the school lawn during Christmas recess, Lewis v. Allen, *supra*, n. 148, which refused to order discontinuance of the words "under God" in the pledge of allegiance, and KONVITZ, FUNDAMENTAL LIBERTIES OF A FREE PEOPLE (1957), 75. For both policy and legal arguments pro and con concerning the Regent's prayer, see PFEFFER, *supra*, n. 71, at p. 304.

may be violated with impunity [169] or that such a child, not advised of his right to do so, will not normally be sufficiently aggressive to claim his constitutional privilege not to participate,[170] the Court holds that the resolution of July 8, 1958, in its present form, is objectionable. The matter will, therefore, be remanded to the Board for modification of its resolution to establish a procedure whereby the parents of each child are advised of the adoption of the resolution calling for the saying of prayer, of the wording of the
317 prayer and of the procedure to be followed when it is said and requested to indicate whether the child shall or shall not participate in the exercise.[171]

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[169] Indeed it can hardly be argued, in connection with a campaign to teach moral values, including "respect for lawful authority and obedience to law" (Regents' Statement, *supra*, n. 5), that the mere fact that no punishment is provided means that there is no compulsion to an order from the School Board, phrased in mandatory terms. Jefferson's letter to Miller, *supra*, n. 42, accords with this
318 view.

[170] Cf. Justice Frankfurter's McCollum opinion, 333 U. S. at 227 (*supra*, n. 20). "The law of imitation operates, and non-conformity is not an outstanding characteristic of children."

[171] While some slight cost will be involved in obtaining such an expression from parents, this alone would not give petitioners standing to sue. Doremus v. Board of Education, *supra*, n. 20, and, despite Zorach's reservation of the point, is not considered of a sufficient degree of importance to invalidate the practice. See People *ex rel.* Lewis v. Graves, 245 N. Y. 195. Particularly is this so since, as we shall see, such an expression is also necessary to protect "free exercise" rights.

Since the matter is, therefore, to be remanded to the Board, it is not necessary to hear petitioner's evidence on the subject of coercion. In any event, to the extent that petitioners seek to rely on the pressure resulting from the school's apparent sanction of prayer and from the necessity of applying for release from the exercise, as distinct from overt acts of the teachers or other school authorities, the evidence would not be material. To recognize "subtle pressures" as compulsion under the Amendment is to stray far afield from the oppressions the Amendment was designed to prevent;[172] to raise the psychology of dissent, which produces pressure on every dissenter, to 320

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[172] Jefferson's Notes on Virginia, *supra*, n. 93, refers to "coercion" and innocent people, "burnt, tortured, fined and imprisoned" and his Act for Establishing Religious Freedom enacted that "no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief * * *"; Madison's Memorial, to "force and violence", 321
"torrents of blood", "attempts to enforce by legal sanctions"; Roger Williams' BLOUDY TENENT, OF PERSECUTION FOR CAUSE OF CONSCIENCE (1644) was directed against persecution and blood spilt in the attempt to enforce uniformity of religion; Locke's A LETTER CONCERNING TOLERATION (1689) was concerned that "no violence nor injury is to be offered" (Crowder Ed., p. 30). Note also the reference in the quotation from Davis v. Beason, *supra*, n. 122, to "oppressive measures adopted, and the cruelties and punishments inflicted."

322 *Opinion by Meyer, J.*

the level of governmental force;[17a] and to subordinate the spiritual needs of believers to the psychological needs of non-believers. The equality of treatment which the Amendment was designed to produce does not require, indeed proscribes, so doing.

This is not to say that the rights accorded petitioners and their children under the "free exercise" clause do not mandate safeguards against such embarrassments and pressures. It is enough on this score, however, that regulations, such as
323 were adopted by New York City's Board of Education in connection with its released time program, be adopted, making clear that neither teachers nor any other school authority may comment on participation or non-participation in the exercise nor suggest or require that any posture or language be used or dress be worn or be not used or not worn. Non-participation may take the form either of remaining silent during the exercise, or if the parent or child so desires, of being

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[17a] Mr. Justice Frankfurter's McCollum opinion, *supra*,
324 n. 20, p. 277, which concluded that "the result is an obvious pressure upon children to attend" should be compared with Mr. Justice Jackson's opinion in the same case (p. 233): "• • • it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress." Jefferson's reference in his letter to Miller, *supra*, n. 42, to "some degree of proscription, perhaps in public opinion" in the issuance of a Thanksgiving proclamation is also to be compared with the Supreme Court's recognition in Richardson v. Goddard, 23 How. 28, that such a proclamation involved no legal compulsion. For Professor Sutherland the problem is "when embarrassment reaches the point of outrage", American Council of Education Report, *supra*, n. 100, at p. 58, 62.

excused entirely from the exercise.[174] Such regulations must also make provision for those non-participants who are to be excused from the prayer exercise.[175] The exact provision to be made is a matter for decision by the Board, rather than the Court, within the framework of constitutional requirements. Within that framework would fall a provision that prayer participants proceed to a common assembly while non-participants attend other rooms, or that non-participants be permitted to arrive at school a few minutes late or to attend separate opening exercises, or any other method 326
which treats with equality both participants and non-participants.[176]

[174] The Brief of *Amicus Curiae* recognizes this. It states (p. 13): "Schools are expected and, on appeal to the Commissioner of Education under Section 310 of the Education Law, in a proper case, would be ordered to accommodate each child according to his conscience and his parents' wishes, by either allowing him to leave the room, or to remain silent throughout the ceremony, or a proper part thereof, as the case may be." The appeal procedure, however, is not sufficient under a law phrased in mandatory terms. There must be regulations setting 327
forth the rights of parent and child before compulsion has an opportunity to operate.

[175] While the result is separation, it is separation for the purpose of according to each the right to follow his own religious prepossessions, and in furtherance of spiritual needs which may constitutionally be accommodated. For these reasons, Brown v. Board of Education, *supra*, n. 58, p. 495, holding racially segregated educational facilities "inherently unequal" is distinguishable.

[176] Of course, permitting attendance at prayer outside school with excusal of the lateness of those so doing would fall squarely within the Zorach case, and the Superintendent's plan for having prayer said a few minutes before 9:00 A. M. would also be acceptable. Of interest, too, is Canon Stokes suggestion, Vol. III, p. 684, of a period of silent prayer, a practice which he notes (Vol. I, p. liv) the United Nations has adopted for its meetings.

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While for the reasons stated, the matter is to be remanded to the Board, the Court should also consider for the Board's guidance on remand the questions raised by petitioners with respect to divisiveness, sectarianism and the New York State Constitution. One of the purposes, it has been said, for adoption of the First Amendment was "to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse."[177] Division over compulsory
329 unification through public school programs was
3 referred to in the *Barnette* decision[178] and the vital necessity to keep divisive forces out of the schools was argued in the *McCollum* concurring opinion[179] in considering whether the practices involved could be coerced. But what was involved in each situation was compulsion;[180] divisiveness

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[177] Mr. Justice Jackson, dissenting, in Everson, 330 U. S. at 27, *supra*, n. 92.

[178] 319 U. S. at 641, *supra*, n. 98.

330 [179] 333 U. S. at 231, *supra*, n. 20. See also Tudor v. Board of Education, *supra*, n. 161.

[180] Thus Madison's eleventh point in the Memorial inveighed against the bill, "Because, it will destroy that moderation and harmony which the forebearance of our laws to intermeddle with Religion, has produced amongst its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions."

and consciousness of religious differences have not been raised to the level of constitutional absolutes.[181] At most, division may be considered as one of many criteria to be used in determining whether a particular practice is within or without the Constitution. With respect to prayer, the constitutional history above reviewed shows a widespread tradition of prayer. And the existence of religious differences is one of the facts of life of which school children are every day made aware by absences for religious holidays, differences in clothing, in dietary habits and in other observances.[182] Religious tensions are part of everyday living and competition among creeds

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[181] Judge Desmond considered divisiveness and coercion "predilections, not questions of law", Zorach v. Clauson, *supra*, n. 19, at p. 177. In any event petitioner's offered proof of division in this school district over this prayer could not be material, for the ultimate conclusion would then have to be that the constitution permits in a community in which divisiveness cannot be shown what it prohibits where there is a showing of divisiveness. There is no such constitutional principle.

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[182] The reference in the Barnette case, *supra*, n. 98, to division over requiring flag salute may be compared with the Report on the Religion and Education Conference for Connecticut, Massachusetts and Rhode Island issued July 27, 1959 by the National Citizens Council for Better Schools. That report lists as a factor which gives rise to "deep tensions" that "Jehovah's Witnesses refuse to allow their children to salute" (p. 3).

is advantageous.[183] "Our heterogeneous society with its different religious groups demands the development of respect for differing points of view and for the right of others to believe differently."[184] The genius of the American experiment has been not a lack of difference in point of view, but absolute equality in matters of thought and belief despite all differences.

Petitioners contend, nonetheless, that there is not equality of treatment because the prayer is sectarian. Without analyzing in detail the meaning of the word "sectarian" as construed by the cases discussed above, it may be stated that the instant prayer which invokes "Almighty God" acknowledges "dependence" upon Him and "asks

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[183] Jefferson's Notes, *supra*, n. 93, stated "Difference of opinion is advantageous in religion. The several sects perform the office of a *censor morum* over each other". Hunt, *James Madison and Religious Liberty*, 1 Ann. Rep. Am. Hist. Assn. (1901), 165, 170, records Madison's fondness for repeating Voltaire's aphorism that: "If one religion only were allowed in England, the Government would possibly become arbitrary; if there were two, the people would cut each other's throats; but as there are such a multitude, they all live happy and in peace", and Madison's view that the security for religious rights was the multiplicity of sects. See also PFEFFER, CREEDS IN COMPETITION (1958), particularly Chapter 9, and the New York Times, April 3, 1959, p. 19, Col. 5, reporting agreement among the speakers at the Annual Meeting of the Associated Church Press "that religious tension was a healthy adjunct to a democratic society."

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[184] The quotation is from the conclusion of the Report on the Religion and Education Conference, *supra*, n. 182, at p. 11, which also stated that: "The conference groups agreed that children should be taught a basic respect for others and that learning an attitude of tolerance should be a part of their formal religious as well as secular training."

blessings" cannot be considered sectarian in the sense that it prefers any particular sect. The fact that the prayer and the manner of its saying may not conform to all of the tenets of the Jewish, Unitarian and Ethical Culture groups, or of any other group, does not mean that the prayer is sectarian. Nor can it be said in any true sense that the granting of legislative permission to say a prayer as an opening exercise in a school is a preference of believers over non-believers when the saying of the prayer is not made compulsory. To put it shortly, since each is free to follow his 338
own predeliction with respect to prayer, to participate in a prayer exercise or to refuse to do so, the exercise cannot be deemed preferential.

For the same reason, that is, that the saying of the prayer is not made compulsory, the particular form of prayer adopted by the respondent Board in the instant case cannot be considered to be invalid as the prescription of a mode of worship. If it be admitted that the Board may constitutionally permit the saying of a prayer as an opening exercise in a school, then it must either adopt a form of prayer or else leave to the 339
discretion of the teacher or a student, if students are used to lead the exercise, the determination of what prayer is to be said. The latter procedure could, of course result in the use in the schools of prayers identifiable as those of a particular sect, therefore preferential, and, therefore, prohibited. In order to prevent such a possibility and to seek the widest possible acceptance, the Board may adopt a form of prayer so long as it does not adopt the prayer of any sect or a prayer sectarian in concept and does not make recitation of the adopted form compulsory.

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This is not to say, however, that the Board may be compelled to permit the saying of a prayer in the schools. The cases discussed above make clear that though the "free exercise" clause allows wide latitude to the individual in public expression of his belief and public demonstration of his worship, the freedom is not absolute. No sacred cow may impede the flow of traffic so necessary to the general welfare; no belief in polygamy, save the believer from prosecution. The state may determine the time and place, and within the limits sug-
341 gested above, the manner of the exercise of such freedom, when it acts to protect its own legitimate interests or that of other citizens. The state may, therefore, in determining the curriculum of its schools, exclude any form of devotional exercise. It follows that the Board's affirmative defense that petitioners in seeking to interfere with the saying of the prayer by the children of others are acting in violation of the Federal and State constitutions must be dismissed.

Petitioners' final contention is that the saying of the prayer violates Article 1, Section 3 of the
342 State Constitution. That section reads as follows:

> "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."

The language of the provision is no broader than the construction given the federal "free exercise" clause and the cases construing the state provision [185] are entirely consistent with the conclusion reached herein. And while Article 11, section 4 of the State Constitution, which prohibits public aid to a school "in which any denominational tenet or doctrine is taught", has not been argued, the conclusion may be stated that since the instant prayer is not "denominational" that section would not exclude it.[186]

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[185] Lewis v. Board of Education, *supra*, n. 148, upheld Bible reading in New York City schools; New York League for Separation of Church and State v. Lyons, 173 Misc. 821, held the erection of a prison chapel and employment of a chaplain not to be a violation; Matter of Lewis v. Allen, *supra*, n. 148, found no violation in school recitation of the pledge of allegiance with the words "under God"; and Baer v. Kolmorgen, *supra*, n. 19, allowed display of a creche on a school lawn during school Christmas recess.

[186] The first three cases cited in n. 185 also interpret this section. In addition see O'Connor v. Hendrick, 184 N. Y. 421, holding that teachers wearing religious garb, and Smith v. Donahue, 202 App. Div. 656, holding that 345
the furnishing of textbooks to parochial school children did violate the section, and People *ex rel.* Lewis v. Graves, *supra*, n. 171, holding released time not violative. Judd v. Board of Education, *supra*, n. 23, which invalidated use of public funds for bus transportation of parochial students was changed by the 1938 amendment to the section. Also of interest is the Report of the Committee on Education and Funds Pertaining Thereto to the 1894 Constitutional Convention (REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, MAY 8, 1894 TO SEPTEMBER 29, 1894 [1900], Vol. 5, p. 693). The Committee (at p. 706) recognized that its words could not bind a court, but stated its opinion to be that the section could not "be taken to prohibit the reading of the Bible in the public schools."

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In summary, the petition, as amended, is held legally sufficient, the Board's defenses are held insufficient and are dismissed, the petitioners' demand for a jury trial is denied for the reason that there is no triable issue of material fact, and the request for mandamus is, as a matter of discretion, denied [187] but the matter is remanded to the Board for further proceedings not inconsistent with the foregoing. An order to that effect may be settled on notice.

347 The Court wishes to thank all counsel for the excellent presentation not only in oral argument, but in the original and supplemental briefs. It is, perhaps, not amiss to conclude this opinion with the repetition of a sentence from the decision of Superintendent Spencer referred to in the beginning. Written one hundred and twenty years ago, the following statement, in the Court's view, most completely conforms to the requirements of both constitutional law and of reason:

> "The simple rule, so to exercise your own rights as not to infringe on those of others
> 348 will preserve equal justice among all, promote harmony, and insure success to our schools."

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[187] Matter of Ahern v. Board of Supervisors, 6 N. Y. 2d 376; Matter of Andresen v. Rice, 277 N. Y. 271, 282.

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Affidavit of No Other Opinion

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIAM J. BUTLER, being duly sworn, deposes and says: That he is one of the attorneys for the petitioner in this proceeding.

That no opinion other than that set forth herein was rendered by the Court below in making the order appealed from.

WILLIAM J. BUTLER 350

Sworn to before me this
18th day of February, 1960.

PETER B. SCHWARZKOPF
Notary Public, State of New York
No. 31-3559950
Qualified in New York County
Commission Expires March 30, 1961

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Stipulation Waiving Certification

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal, the order appealed from, and all the papers upon which the Court below acted in making said order appealed from, and the whole thereof, now on file in the office of the Clerk of the County of Nassau; and certification thereof by said Clerk, pursuant to Section 616 of the Civil Practice Act, is hereby waived.

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Dated: New York, March , 1960.

BUTLER, JARLOW & GELLER,
Attorneys for Petitioners-Appellants.

GUSS, NEIER & DAIKER,
Attorneys for
Respondents-Respondents.

HAHN, HAHN & FORD,
Attorneys for
Intervenor-Respondents-Respondents.

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ADDITIONAL PAPERS
TO THE
COURT OF APPEALS

355

Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

Index No. 1824/1959

In the Matter of the Application of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,
Petitioners-Appellants,

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against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,
Respondents-Appellees,

directing them to discontinue a certain school practice

and

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,
Intervenor-Respondents-Appellees.

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Sirs:

PLEASE TAKE NOTICE, that the above-named Petitioners, Steven I. Engel, Daniel Lichtenstein,

358 *Notice of Appeal*

Monroe Lerner, Lenore Lyons and Lawrence Roth, hereby appeal to the Court of Appeals from the order herein of the Appellate Division of the Supreme Court, Second Department, entered in the office of the Clerk of that court on October 17, 1960, affirming so much of the order herein of the Supreme Court, of Nassau, entered in the office of the Clerk of the County of Nassau on October 5, 1959, as denies the petition herein, denies the Petitioners' demand for a jury trial, and remands the matter to the Respondent Board of Education
359 for further proceedings.

Dated: New York, November 2, 1960.

Yours, etc.,

BUTLER, JABLOW & GELLER
Attorneys for Petitioners-
Appellants
400 Madison Avenue
New York 17, New York

360 To:

CLERK OF THE COUNTY
OF NASSAU
Mineola, New York

GUNN, NEIER & DAIKER, Esqs.
Attorneys for Respondents-
Appellees
49 Main Street
Port Washington, New York

HAHN, HAHN & FORD, Esq.
Attorneys for Intervenor-
Respondents-Appellees
117 Pennsylvania Avenue
Brooklyn 7, New York

Order of Affirmance 361

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 17th day of October, 1960

Present:

Hon. Gerald Nolan,
Presiding Justice.
" George J. Beldock,
" Marcus G. Christ,
" Nicholas M. Pette, 362
" Arthur D. Brennan,
Justices.

In the Matter of the Application of

Steven I. Engel, Daniel Lichtenstein, Monroe Lerner, Lenore Lyons and Lawrence Roth,
Appellants,

against

William J. Vitale, Jr., Philip J. Freed, Mary Harte, Anne Birch and Richard Saunders, constituting the Board of Education of Union Free School District Number Nine, New Hyde 363
Park, New York,
Respondents,

directing them to discontinue a certain school practice

and

Henry Hollenberg, Rose Levine, Martin Abrams, Helen Swanson, Walter F. Gibb, Jane Ehlen, Ralph B. Webb, Virginia Zimmerman, Virginia Davis, Violet S. Cox, Evelyn Koster, Irene O'Rourke, Rosemarie Petelenz, Daniel J. Reehil, Thomas Delaney and Edward L. MacFarlane,
Intervenors-Respondents.

The above named Steven I. Engel, Daniel Lichtenstein, Monroe Lerner, Lenore Lyons and Law-

364 *Order of Affirmance*

rence Roth, petitioners in this proceeding having appealed to the Appellate Division of the Supreme Court from so much of an Order of the Supreme Court entered in the Office of the Clerk of the County of Nassau on October 5th, 1959, as denies the petition, denies the petitioners' demand for a jury trial and remands the matter to the respondent Board of Education for further proceedings, and said appeal having been taken pursuant to permission granted by the Special Term (Section 1304 of the Civil Practice Act), and the said
365 appeal having been argued by Mr. William J. Butler (Stanley Geller and Peter B. Schwartzkopf of Counsel) for appellants, and argued by Mr. Bertram B. Daiker (Wilford E. Neier of Counsel) for respondent Board of Education, and argued by Mr. Porter R. Chandler (Thomas J. Ford and Richard E. Nolan of Counsel) for intervenors-respondents, and submitted by Mr. Charles A. Brind (John P. Jehu, Elizabeth M. Eastman and George B. Farrington of Counsel) for Board of Regents of the University of the State of New York, as amicus curiae, and due deliberation
366 having been had thereon; and upon the opinions and decision slip of the court herein, heretofore filed:

It is Ordered that the order insofar as appealed from be and the same hereby is affirmed, without costs, upon the opinion of the Special Term.

Nolan, P.J., Christ, Pette and Brennan, J.J. concur; Beldock, J., concurs in part and dissents in part with opinion.

Enter:

John J. Callahan,
Clerk.

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Opinion of Appellate Division

SUPREME COURT

APPELLATE DIVISION

SECOND JUDICIAL DEPARTMENT

NOLAN, *P. J.*, BELDOCK, CHRIST, PETTE and BRENNAN, *JJ.*

In the Matter of the Application of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH, 368
Appellants,

against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,
Respondents,

directing them to discontinue a certain school practice

and

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HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,
Intervenors-Respondents.

Appeal by petitioners from so much of an order of the Supreme Court at Special Term (Bernard S. Meyer, J.), entered October 5, 1959 in Nassau County, as denies the petition, denies petitioners'

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demurred for a jury trial, and remands the matter to the respondent Board of Education for further proceedings.

Permission to appeal was granted by the Special Term pursuant to section 1304 of the Civil Practice Act.

William J. Butler (Stanley Geller and Peter B. Schwartzkopf of counsel) for appellants.

Bertram B. Daiker (Wilford E. Neier of
371 counsel) for respondent Board of Education.

Porter R. Chandler (Thomas J. Ford and Richard E. Nolan of counsel) for intervenors-respondents.

Charles A. Brind (John P. Jehl, Elizabeth M. Eastman and George B. Farrington of counsel) for Board of Regents of the University of the State of New York, *amicus curiae*.

Per Curiam.

372 The purpose of this article 78 proceeding is to compel the local school board to discontinue its practice of requiring daily recitation in the schools of the "Regents' Prayer", which reads as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

The Justice at Special Term ir a comprehensive opinion. (*Matter of Engel* v. *Vitale*, 18 Misc. 2d 659), held that the pleadings do not raise a triable issue as to any material fact. He denied the petition as a matter of discretion; and he re-

manded the matter to the school board for further proceedings consistent with his opinion.

The further proceedings relate to the adoption of certain safeguards intended to eliminate any element of coercion or compulsion upon the student with respect to the daily recitation of the prayer.

We agree with the views expressed in the opinion of the learned Justice at Special Term.

Hence, the order insofar as appealed from should be affirmed, without costs, upon said opinion. 374

Nolan, P. J., Christ, Pette and Brennan, JJ., concur.

Beldock, J., concurs in part and dissents in part, with the following opinion:

While I agree that the decretal provisions of the order should be affirmed, I disagree as to the grounds stated by the Justice at Special Term for his determination, and I disagree as to the nature of the further proceedings suggested by him in his opinion.

In my opinion the order should be affirmed, not upon the grounds stated by said Justice, but solely 375 on the grounds that the voluntary recital of the prayer is not an act of religious training or teaching; that under proper safeguards against compulsion it is permissible; and that it violates neither the First Amendment to the Federal Constitution nor decisional law.

It is also my opinion that the order should be modified so as to remand the proceeding to the local Board of Education for further action consistent with my views as hereinafter expressed.

The question to be decided is whether an order of the local Board of Education directing the

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recitation of a prayer in the public schools at the opening of each school day, following the salute to the flag, violates the Federal and State constitutional guarantees of religious freedom, even though such order be amended and administered so as to make the recitation optional with each student.

The prayer, known as the "Regents' Prayer", is sponsored by the Board of Regents of the State of New York. It contains 22 words; re-
377 quires less than one minute to recite; is not accompanied by any comment; and reads as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." The recitation is led either by the teacher or by a student designated by the teacher, with the other class students repeating the prayer.

The First Amendment to the Federal Constitution forbids the making of laws "respecting an establishment of religion, or prohibiting the free exercise thereof". The State Constitution (N. Y. Const., art I, 3) provides that the "free exercise
378 and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind."

The question as to whether a school board's order requiring the teacher, within the classroom, to cause a prayer to the Almighty to be recited, violates the First Amendment to the Federal Constitution and corresponding provisions of the State Constitution (as well as the question of selected Bible reading in the classroom), has been the subject of considerable controversy in this country for more than a century. The question is

of grave concern to all. The judicial pronouncements thereon are in conflict.

I have no doubt that the *compulsory* recitation of a prayer in the classroom violates the constitutional provisions. I have concluded, however, that the prayer here involved (which I agree is nonsectarian and nondenominational), does not constitute religious teaching and, if voluntary and circumscribed by proper safeguards, does not violate the constitutional proscription of laws "respecting an establishment of religion". Nor 380
do I find the prayer to be in conflict with recent decisional law on the related subject of teaching sectarian religion during the "released time" period.

From the point of view of policy I fully subscribe to the statement of principle in the Regents' Statement of Moral and Spiritual Training in the Schools, adopted November 30, 1951, to wit: "Belief in and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded." It cannot be gainsaid that, above all things, it is essential for our children to be exposed to programs which emphasize the 381
moral and spiritual heritage which is America's and to be inspired by the examples of their ancestors toward a greater respect for lawful authority, for love of God and respect for parent and home. However, we are not now dealing with a matter of policy, but with one of power.

The basic issue here deals with the power of the school board to *direct* the recital of this prayer *on* school premises *under the supervision of the school teachers*. It is not disputed by the litigants that the prayer is of a religious nature. The

main dispute is as to whether it is religious instruction and whether it is said by the students under compulsion.

The Justice at Special Term pointed out that (p. 672) "the State's interest in familiarizing students with the religious nature of our heritage would not justify the use of prayer as a vehicle for imparting that knowledge since there are other equally effective and constitutionally uninhibited means of achieving that end."

383 The Justice at Special Term also declared (p. 673) that if the purpose is to inculcate in the students a love of God, then "as an exercise required of all pupils, it would constiute religious instruction in violation of the 'establishment' clause", and as a permissive exercise, unless participating children were free "to adopt any posture, use any gesture, wear any attire, use any language, or follow any other practice which his or her own religious beliefs may dictate", it would "violate the 'free exercise' clause of the Federal and State Constitutions, as well as the parent's rights, * * * under the due process clause to con-
384 trol the education of his child."

The Justice at Special Term sustained the validity of the prayer and the power of the school board to direct it. He based his conclusion upon the theory that prayer in the schools is permissible "not as a means of teaching 'spiritual values' but because traditionally, and particularly at the time of the adoption of the First and Fourteenth Amendments, *this was the accepted practice*." (Italics supplied.) (*Matter of Engel v. Vitale*, 18 Misc. 2d 659, 673, *supra*.) Apparently, therefore, the basis of his conclusion is that at the time of the amendments it was the accepted practice to

utilize prayer in the public schools and, hence, it is proper to resort to prayer today.

While I agree with the final conclusion reached by the learned Justice at Special Term, I am in total disagreement with his reasons therefor, and particularly with the "accepted practice" theory.

My sole reason for sustaining the "Regents' Prayer" is that, in my opinion, the prayer here involved *does not constitute religious teaching.* The recital of this prayer does nothing more than acknowledge the existence of God and dependence upon him. It gives no training or instruction of 386
any religious nature whatever. There can be no constitutional objection to a prayer which is said without rites or ceremony or doctrinal teaching, and which serves at the beginning of each day to give each student who believes in God "a brief moment with eternity" and a feeling of "humility before the Supreme Power" (*Doremus* v. *Board of Educ.*, 5 N. J. 435, 75 A. 2d 880, 884, 889, appeal dismissed 342 U. S. 429). Such a prayer merely affirms and reaffirms "that this a religious nation"; it recognizes (as do the Federal Constitution, every State Constitution and every colonial 387
grant and charter beginning with the one to Christopher Columbus) "a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well being of the community" (*Holy Trinity Church* v. *United States*, 143 U. S. 457, 468, 470).

I agree fully with the following statements made by the Supreme Court of New Jersey in the *Doremus case* (75 A. 2d 880, *supra*, pp. 882, 889):

> "Was it the intent of the First Amendment that the existence of a Supreme Being

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should be negated and that the governmental recognition of God should be suppressed? Not that, surely * * *.

"Instances could be multiplied going to the undeniable result that the Constitution itself assumes as an unquestioned fact the existence and authority of God and that * * * all branches of the government followed a course of official conduct which openly accepts the existence of God as Creator and Ruler of the Universe * * *. (p. 882.)

389 "The fact is that the First Amendment does not say, and so far as we are able to determine was not intended to say, that God shall not be acknowledged by our government as God. Our view is that a prohibition which is not in the language of the amendment and which is contrary to the intention of those who framed and adopted the instrument, should not now be read into it." (p. 889.)

While the authorities are in conflict, the general
390 or prevailing rule, supported by the weight of authority, appears to be that the recitation of a nondenominational prayer without comment (and particularly an informal prayer), is not prohibited by the constitutional provisions, either State or Federal, provided: (1) participation by the student in such recitation is not compulsory; (2) such recitation merely tends "to inculcate fundamental morality" in the students; and (3) it is not "carried so far as to emphasize the teaching of a particular sect" or of any particular religious doctrine (Annotations, 3 41 A. L. R. 1144, 5 A. L. R. 866, 45 A. L. R. 2d 742; 47 Am. Jur., Schools, § 210, and cases there cited;

Lewis v. *Board of Educ. of City of N. Y.*, 157 Misc. 520, 528-550, mod. on other grounds, 247 App. Div. 106, appeal dismissed, 276 N. Y. 490; *Doremus* v. *Board of Educ.*, 5 N. J. 435, appeal dismissed 342 U. S. 429, *supra*; *contra*; *Schempp* v. *School Dist. of Abington Township Pa.*, 177 F. Supp. 398, 404-407).

In my opinion, the prayer here is not said pursuant to any law or order "respecting an establishment of religion" (U. S. Const., 1st Amdt.). It is said pursuant to an order which authorizes, as prescribed by both the State and Federal Constitutions, the "free exercise" and enjoyment 392
of religious profession and worship, without discrimination or preference. As to those who believe in God, the prayer constitutes simply a "pledge of allegiance" to Him and an invocation of His divine blessing. In other words, it is a voluntary confession of faith in the exercise of the religious freedom guaranteed to every individual by the State and Federal Constitutions. Accordingly, it does not partake in the slightest degree of religious training or religious teaching.

In a recent case (*Matter of Lewis* v. *Allen*, 5 393
Misc. 2d 68, 73, *supra*) in which an attack was made upon the inclusion of the words "under God" in the pledge of allegiance to the flag, Mr. Justice Bookstein at Special Term, Albany County, made these statements, which are quite apropos:

> "If the petitioners' contention be sound, it may be wondered whether the public school curriculum might properly include the Declaration of Independence and the Gettysburg Address. Could 'America' ('Protect us by thy might, Great God, our King!') be sung in a public school without offending the First

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> Amendment? And might not the presidential oath of office have questionable constitutional status?"

The contention that acknowledgments of and references to Almighty God are acceptable and desirable in all other phases of our public life but not *in our public schools* is, in my judgment, an attempt to stretch far beyond its breaking point the principle of separation of church and state and to obscure one's vision to the universally ac-
395 cepted tradition that ours is a nation founded and nurtured upon belief in God.

In the most recent pronouncement by the United States Supreme Court which dealt with the "released time" program in our public schools (*Zorach* v. *Clauson*, 343 U. S. 306), the court gave to the nation these basic principles for its guidance (pp. 312-314):

> "There is much talk of the separation of Church and State in the history of the Bill of Rights and in the decisions clustering around the First Amendment. (See *Everson*
396 v. *Board of Education*, 330 U. S. 1; *McCollum* v. *Board of Education*, *supra*). There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And * * * the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. *The First Amendment, however, does not say that in every and all respects there shall be a separation of Church*

and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. * * * Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our court-room oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the court opens each session: 'God save the United States and this Honorable Court'. (Italics supplied.) 398

* * *

"We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service 399

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to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religions on any person. But we find no con-
401 stitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those
402 who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here."

The prayer here under attack is indeed a part of man's immemorial, inseparable and absolute right to declare his faith and to acknowledge and place his trust in God. The constitutional provisions are intended to protect and to perpetuate this right in man and never to deprive him of it or to discriminate against it. And, in furtherance of such protection, the state must scrupulously observe a strict neutrality; it may not

favor or disfavor the believer over the non-believer or one sect over another (cf. *Everson* v. *Board of Educ.*, 330 U. S. 1, 18, 64; *Matter of Zorach* v. *Clauson*, 303 N. Y. 161, 170, 180-183, affd. *sub nom. Zorach* v. *Clauson*, 343 U. S. 306, 311-315, *supra*).

Of course, the "man of no religion has a right to act in accordance with his lack of religion" but he has "no right to insist that others shall have no religion" (*Reichwald* v. *Catholic Bishop of Chicago*, 258 Ill. 44, 48), particularly since, as stated, from the very inception of this country we have 404
been essentially "a religious people whose institutions presuppose a Supreme Being" (*Zorach* v. *Clauson*, 343 U. S. 306, 313, *supra*; *cf. Holy Trinity Church* v. *United States*, 143 U. S. 457, 465-470, *supra*). The right to disbelieve as well as to believe is guaranteed by the First Amendment, and the disbeliever may therefore refrain from engaging in prayer. But the Amendment affords the disbeliever "no preference over those who do believe in God and who * * * choose to express that belief" (*Matter of Lewis* v. *Allen*, 5 Misc. 2d 68, 75, *supra*). 405

As pointed out by Judge Desmond in his concurring opinion in the *Zorach* case (*supra*, pp. 181-183), it "is inconceivable" that the First Amendment to the Federal Constitution "was ever meant to prohibit governmental encouragement of, or cooperation with, religions generally" because "ours is a religious nation" and because such aid and encouragement, "as distinguished from establishment or support of separate sects, has never been considered offensive to the American constitutional system."

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Here, when the local school board authorizes the prayer to be said at the opening of the school day by all those *desiring* to participate, it does no more than to postpone the period of the secular instruction for the minute or less required for the prayer or acknowledgment of religious faith. In my opinion such an accommodation of the secular education to the voluntary prayer or confession of religious faith directed by this local Board of Education, is not religious teaching or religious instruction. It is a proper and commendable practice which is in keeping with the best traditions of this country and with the relevant provisions of the State and Federal Constitutions (cf. *Matter of Zorach* v. *Clauson*, 303 N. Y. 161, 170, 180-183, *supra; Zorach* v. *Clauson*, 343 U. S. 306, 311-315, *supra; Matter of Lewis* v. *Allen*, 5 Misc. 2d 68, *supra; 64th St. Residences* v. *City of New York*, 10 Misc. 2d 841, 845-847; *Baer* v. *Kolmorgen*, 14 Misc. 2d 955, 957; *Baer* v. *Kolmorgen*, 14 Misc. 2d 1015, 1016-1017, 1021-1022).

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I now come to the contention as to the compulsory nature of the prayer. It is claimed that subtle pressure is created by reason of the necessity for the parent and the child to request that the child be excused from participation, and that such pressure *compels* participation in the prayer. In remanding the matter to the Board of Education, the Justice at Special Term has left the procedure to be adopted entirely to the Board's wisdom.

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However, the said Justice in his opinion expressed his own views as to some of the methods to be employed to eliminate the elements of coercion and "subtle" pressure. In doing so he has recommended, among other things: (1) that the child to be excused may arrive "later" or appear

in class after the recital of the prayer; (2) that the prayer may be said in "common assembly" and the excused child sent to another room; and (3) that there shall be no comment made with respect to the excused child or any requirement imposed on him as to his posture or attire (similar to the practice adopted by the New York City Board of Education in its operation of the released time program).

I fully agree with the last recommendation with respect to the omission of any comment and of any requirement as to posture and attire. I disagree, however, with respect to the other stated recommendations. 410

It is my opinion that the choice of action to be followed should not be left to the Board of Education to be *mandated* upon the parent; but that the *free choice* of the *alternative procedures* should be *left to the parent* pursuant to a formula to be adopted by the Board after thorough discussion and consultation with all interested groups.

I disapprove of the recommendation that the prayer be said in common assembly and the excused child be sent to another room. In such proposed practice I see a potential pressure which, as to some students, may rise to the level of compulsion or coercion, and which as to many students may result in a schism and divisiveness. 411

I likewise disapprove of the recommendation that the excused child may report "late". I believe that the basic discipline of any school requires a uniform time of commencement for all students in the same grades or classes.

My own preference is that the prayer be one not mandated and required to be repeated or recited verbatim by all in attendance in the room,

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pursuant to the order of the school board. I would suggest that the recitation of the prayer be put on a voluntary basis and that it be conducted in a manner similar to that of an invocation or benediction by a priest, minister, rabbi, or layman at public or private functions attended by men of all faiths, namely: that the prayer be recited by the teacher or by a student designated by the teacher; that the other students in the class be invited (not directed) to join in the prayer if they so desire by repeating it aloud or *sotto voce* or by silent
413 meditation, and that all those present who elect not to join may *refrain* from participating and remain quiet. In other words, even though those present in the classroom may include all the unexcused students only, nevertheless there should be no requirement for the students to repeat the prayer *aloud*. Each student should be free to do so or to remain silent, according to his own conscience and his parental instruction.

It may well be that, despite all the practicable safeguards taken, some vestige of compulsion due to embarrassment may still remain, because when
414 one abstains "it sets him apart as a dissenter, which is humiliating" (*McCollum* v. *Board of Educ.*, 333 U. S. 203, 232). Such embarrassment, however, is the inevitable consequence of dissent; it is the price which every nonconformist must pay. But, as pointed out by Mr. Justice Jackson in the McCollum case (p. 233):

> "Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or

dress. Since no legal compulsion is applied to * * * [the dissenting student] and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction [to intervene and stop the practice] on this ground."

In conclusion, it is suggested that in the formation of its procedures on the remand, the school board may well use as a guide the classic statement made in *1839* by the then New York State Superintendent of Schools, Mr. Spencer. He said: 416

"'Both parties have rights; the one to bring up their children in the practice of publicly thanking their Creator for his protection, and invoking his blessing; the other of declining in behalf of their children, the religious services of any person in whose creed they may not concur, or for other reasons satisfactory to themselves. These rights are reciprocal, and should be protected equally; and neither should interfere with the other. Those who desire that their children should engage in public prayer have 417 no right to compel other children to unite in the exercise, against the wishes of their parents. Nor have those who object to this time, place or manner of praying, or to the person who conducts the exercises, a right to deprive the other class of the opportunity of habituating their children to what they conceive an imperious duty. Neither the common school system, nor any other social system, can be maintained, unless the con-

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> scientious views of all are equally respected. The simple rule, so to exercise your own rights as not to infringe on those of others, will preserve equal justice among all, promote harmony, and insure success to our schools." (*Matter of Engel* v. *Vitale*, 18 Misc. 2d 659, 661-662, supra.)

This statement of Superintendent Spencer is as valid today as it was when made. It summarizes, perhaps better than elsewhere, the re-
419 spective legal rights of the believer and the nonbeliever and the best means of preserving such rights in relation to prayer in the classroom.

It is my opinion that the "Regents Prayer" may be validly integrated into the curricula of the public schools, provided that participation in such daily prayer is made optional with each student in accordance with the safeguards here suggested.

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Stipulation Waiving Certification of Record to Court of Appeals

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the foregoing are true and correct copies of the Papers on Appeal to the Appellate Division, Second Department; the Order of Affirmance and the Notice of Appeal to the Court of Appeals, all of which are on file in the office of the Clerk of the County of Nassau, as well as the Opinion of the Appellate Division which is on file with the Clerk of the Appellate Division, Second Department.

422

Certification of all of the foregoing papers is hereby waived.

Dated: New York, December , 1960.

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GUNN, NEIER & DAIKER,
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423

HAHN, HAHN & FORD,
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[fol. 142]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of STEVEN I. ENGEL et al., Appellants, v. WILLAIM J. VITALE, JR., et al., Constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York, Respondents. HENRY HOLLENBERG, et al., Intervenors-Respondents.

OPINION—Decided July 7, 1961

* * * * * * *

Chief Judge DESMOND. In 1951 and again in 1955 the Board of Regents, governing body of our State public school system, recommended to all local school boards that "at the commencement of each school day the act of allegiance to the Flag might well be joined with this act of reverence to God: 'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country'". In 1958 the respondents, who are the board members of a public school district in [fol. 143] Nassau County, conformed to the Regents' recommendation and gave instructions to the teaching staff to adopt the practice in the district's schools. Petitioners, taxpayers in the district and parents of children attending the schools and all (except one "non-believer") being members of various religious bodies, brought this proceeding for an order directing the board to discontinue the practice. They assert that it is unlawful because of the prohibitions of the First Amendment ("no law respecting an establishment of religion, or prohibiting the free exercise thereof") and the command of section 3 of article I of our State Constitution ("The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind").

The order here appealed from contains adequate provisions to insure that no pupil need take part in or be present during the act of reverence, so any question of "compulsion" or "free exercise" is out of the case (see *Zorach* v. *Clauson*, 343 U. S. 306).

What remains of appellants' argument is this: that the saying of the "Regents prayer" as a daily school exercise is a form of State-sponsored religious education and is accordingly an unconstitutional "establishment of religion". If the utterance of these reverential words was "religious education", then providing such education would be so far beyond the powers of a public school board as to be wholly arbitrary and unlawful, so that the courts would need no constitutional warrant for forbidding it. But it is not "religious education" nor is it the practice of or establishment of religion in any reasonable meaning of those phrases. Saying this simple prayer may be, according to the broadest possible dictionary definition, an act of "religion", but when the Founding Fathers prohibited an "establishment of religion" they were referring to official adoption of, or favor to, one or more sects. They could not have meant to prohibit mere professions of belief in God for, if that were so, they themselves in many ways were violating their rule when and after they adopted it. Not only is this prayer not a violation of the First Amendment (no decision of this or of the United States Supreme Court says or suggests that it is) but a holding that it is such a violation would be in defiance of all American history, and such a holding would destroy a part of the essential foundation of the American governmental structure.

The "Regents prayer" is an acknowledgment of our dependence upon Almighty God and a petition for the bestowal of His blessings. It includes an acknowledgment of the existence of a Supreme Being just as does the Declaration of Independence and the Constitutions of each of the 50 States of the Union, including our own. In construing even a Constitution some attention must be paid to the obvious intent of those who drafted it and adopted it (*Matter of Carew* v. *Morton*, 297 N. Y. 361). That the First Amend-[fol. 144] ment was ever intended to forbid as an "establishment of religion" a simple declaration of belief in God is so contrary to history as to be impossible of acceptance. No historical fact is so easy to prove by literally countless illustrations as the fact that belief and trust in a Supreme Being was from the beginning and has been continuously part of the very essence of the American plan of govern-

ment and society. The references to the Deity in the Declaration of Independence; the words of our National Anthem: "In God is our trust"; the motto on our coins; the daily prayers in Congress; the universal practice in official oaths of calling upon God to witness the truth; the official thanksgiving proclamations beginning with those of the Continental Congress and the First Congress of the United States and continuing till the present; the provisions for chaplaincies in the armed forces; the directions by Congress in modern times for a National Day of Prayer and for the insertion of the words "under God" in the Pledge of Allegiance to the Flag; innumerable solemn utterances by our Presidents and other leaders—all these and many more make historically unescapable the flat statement in *Zorach* v. *Clauson* (343 U. S. 306, 313, *supra* [1952]) that: "We are a religious people whose institutions presuppose a Supreme Being", which paraphrased the Supreme Court's similar assertion in 1892 in the *Holy Trinity Church* case (*Holy Trinity Church* v. *United States*, 143 U. S. 457). As Justice BELDOCK of the Appellate Division wrote in this case: "The contention that acknowledgments of and references to Almighty God are acceptable and desirable in all other phases of our public life but not *in our public schools* is, in my judgment, an attempt to stretch far beyond its breaking point the principle of separation of church and State and to obscure one's vision to the universally accepted tradition that ours is a Nation founded and nurtured upon belief in God."

The "universally accepted tradition" referred to by Justice BELDOCK has been maintained without break from the days of the Founding Fathers, all of whom believed in the existence of God (see Cousins, In God We Trust), to the day of the inauguration of President Kennedy. It is an indisputable and historically provable fact that belief and trust in a Creator has always been regarded as an integral and inseparable part of the fabric of our fundamental institutions. It is not a matter of majority power or minority protection. Belief in a Supreme Being is as essential and permanent a feature of the American governmental system as is freedom of worship, equality under the law and due process of law. Like them it is an American absolute,

an application of the natural law beliefs on which the Republic was founded and which in turn presuppose an Omnipotent Being.

The motives and purposes of the Regents and of the local board are noble. The success of the practice is problematical. But there is no problem of constitutionality.

The order should be affirmed, without costs.

[fol. 145]

Frossel, J. (concurring). The thoughtful and thorough opinion written at Special Term and its review of the relevant history and the authorities, culminating in its order of March 17, 1961, renders extended discussion unnecessary.

We are not here concerned with the statements of the Board of Regents or of the local school board as to their motives or purposes in the eventual promulgation of the challenged recitation.

The narrow question presented is: Do the Federal and State Constitutions prohibit the recitation by children in our public schools of the 22 words acknowledging dependence upon Almighty God, and invoking His blessing upon them, their parents and teachers, and upon our country? To say that they do seems to me to stretch the so-called separation of church and State doctrine beyond reason.

History and common experience teach us that the perception of a Supreme Being, commonly called God, is experienced in the lives of most human beings. Some, it is true, escape it, or think they do for a time. In any event, that perception is manifest, independent of any particular religion or church, and has become the foundation of virtually every recognized religious faith—indeed, the common denominator. One may earnestly believe in God, without being attached to any particular religion or church. Hence a rule permitting public school children, willing to do so, to acknowledge their dependence upon Him, and to invoke His blessings, can hardly be called a "law respecting an establishment of religion" or "prohibiting the free exercise thereof" in transgression of the First Amendment, which in nowise prohibits the recognition of God, or laws respecting such recognition.

The challenged recitation follows the pledge of allegiance, which itself refers to God. School children are permitted to sing "America", the fourth stanza of which is indeed a prayer, invoking the protection of "God", "Author of Liberty". The preamble to our State Constitution, which is taught in our public schools, provides: "We the People of the State of New York, grateful to Almighty God for our Freedom". Virtually every State Constitution in the United States, as well as the Declaration of Independence, contains similar references. To say that such references, and others of like nature employed in the executive, legislative and judicial branches of our Government (see *Zorach* v. *Clauson*, 343 U. S. 306, at pp. 312-313), unrelated to any particular religion or church, may be sanctioned by public officials everywhere but in the public school room defies understanding.

[fol. 146] As Mr. Justice DOUGLAS said, in the *Zorach* case (*supra*, at p. 313), in holding that the New York City released time program does not violate the First Amendment, "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs or creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." Here no partiality is shown, nor are classrooms being turned over to religious instructors as in *McCollum* v. *Board of Educ.* (333 U. S. 203). Any effort of a particular group to promote its own beliefs, doctrines, tenets and dogma must be carried on outside the public school, and any law to the contrary would violate the First Amendment. (*McCollum* v. *Board of Educ., supra.*)

As we see it, then, the challenged recitation was rightly upheld. It is not compulsory, is clearly nonsectarian in language, and neither directly nor indirectly even suggests belief in any form of organized or established religion. It permits each child to express gratitude to God and to invoke His blessing, to be steadfast in the faith of his acceptance if he has one; it compels no one, directly or indirectly, to

do anything, if that be his or his parents' wish. All remain free, and thus we do not show preference as between "those who believe in no religion" and "those who do believe" (*Zorach* v. *Clauson*, *supra*, p. 314).

The orders appealed from should be affirmed, without costs.

Burke, J. (concurring). I concur in the opinions of Chief Judge Desmond and Judge Froessel. The dissenting opinion not only inadvertently distorts the purposes of the First Amendment, but is also self-contradictory. The First Amendment, it admits, specifically forbids any kind of monism in respect to religion. The amendment, it concedes, encourages diverse religious tenets. But the opinion reads into the amendment *an attempt to compel conformity* in the field of education—in other words, a "compulsory unification of opinion" in all school boards to totally reject any religious element in education and banish it from the schools. This, of course, would force on the children a culture that is founded upon secularist dogma.

This interpretation rests on a misunderstanding. There is no language in the amendment which gives the slightest basis for the interpolation of a Marxist concept that mandates a prescribed ethic. According to the opinion, the separation of church and State which was intended to encourage *religious* interests among our people would become the constitutional basis for the *compulsory exclusion of any religious element* and the consequent promotion and [fol. 147] advancement of atheism. It is not mere neutrality to prevent voluntary prayer to a Creator; it is an interference by the courts, contrary to the plain language of the Constitution, on the side of those who oppose religion.

Dye, J. (dissenting). The question posed on this appeal is whether the recital of a school-sponsored prayer may be required as a daily procedure in a public school. This question comes about as a result of a recommendation duly adopted at a special meeting of the Board of Education of Union Free School District Number Nine, New Hyde Park, New York, held July 8, 1958, requiring that "the

regents prayer be said daily in our schools", pursuant to which the board gave a "direction to the District Principal that this be instituted as a daily procedure to follow the salute to the flag" (Minutes, Board of Educ., Union Free School Dist. No. 9, of meeting July 8, 1958).

The Regents prayer is worded as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." It derives from the "Regents Statement on Moral and Spiritual Training in the Schools", issued by the New York State Board of Regents, as duly adopted at a meeting held on November 30, 1951. This statement was reaffirmed and supplemented by "The Regents Recommendations for School Programs on America's Moral & Spiritual Heritage", unanimously adopted March 25, 1955. The recommendations requoted the opening sentence of the 1951 statement, viz.: "Belief in and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded", and went on to express the conviction that "such fundamental belief and dependence is the best security against the dangers of these difficult days and the adoption of their recommendations the best way of insuring that this Government and our way of life shall not perish from the earth".

The Regents recommended that school programs be instituted, stressing the moral and spiritual heritage of America. It was in response to this recommendation that the respondent board promulgated the above order.

In the schools in the respondents' district, it is the practice to say the prayer immediately after the salute to the flag, as a required daily procedure. It is led by the teacher or by a student selected by the teacher, with other students joining therein. While it does not appear whether any students leave the classroom during such recital, no penalty attaches for non-participation, since the board announced that, as a matter of policy, no child was to be required or encouraged to join in said prayer against his or her wishes. [fol. 148] The petitioners with one exception—a nonbeliever—are all members of various religious faiths and, as taxpayers and parents of children attending public schools within the district, have challenged the saying of the prayer and have demanded its discontinuance on the ground that

it amounts to an abridgement of religious freedom guaranteed by the First and Fourteenth Amendments to the Federal Constitution and section 3 of article I and section 4 of article XI of the New York State Constitution which, in essence, is to say that it constitutes a breach in Jefferson's metaphorical wall "separating church and state".

No one doubts for a moment that we are a religious people. It can be safely said that under no other government —past or present—have the people enjoyed such an untrammeled freedom to worship as they please and to indulge such freedom in more different ways and according to more diverse tenets and beliefs than do the people of the United States. The number of sects and religious groups are almost countless, due, no doubt, to the varied origins of our heterogeneous population who have come here seeking, among other things, an asylum from religious persecution and a freedom to gain salvation in their own chosen way. The recognition of the need for the spiritual comfort and solace derived from religious practices was a first concern of the Founding Fathers who gave it expression in the simple and plainly worded phrase: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". (U. S. Const., 1st Amdt.) Our State Constitution reiterates the same thought as "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind". (N. Y. Const., art. I, §3.)

The natural consequence of these fundamental principles is not only to allow but to guarantee to all citizens an absolute freedom in the exercise of religious belief or no belief. By the same token, our State is free to function without interference by or dictation from an organized church. This mutual forbearance in spirit and in practice has eliminated divisiveness in a most sensitive area, created mutual respect for both church and State and has unified our people in a way that no other force could do.

The development of the precise meaning of the establishment and freedom clauses of the First Amendment has had a long and interesting history which needs no narration here. Very recently the United States Supreme Court has

dealt with it in a series of historical decisions which, though varying in details, make it clear that the establishment and freedom clauses of the First Amendment constitute a complete and unequivocal separation of church and State, a wall [fol. 149] which "must be kept high and impregnable", for in modern times it means at least this: "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*." (*Everson* v. *Board of Educ.*, 330 U. S. 1, 15-16.) A year later, in *McCollum* v. *Board of Educ.* (333 U. S. 203, 210), involving a released time program in Illinois public schools, the United States Supreme Court found that the program, which in substance permitted outside teachers sponsored by religious organizations to give instruction in religion to school children, in the school building, during the school hours, as a substitute for the secular teaching provided in accordance with the compulsory education law, was "beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith". This, as Mr. Justice Black took pains to point out (pp. 211-212), did not "manifest a government hostility to religion or religious teaching. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guarantee of the free exercise of religion", and the key to its meaning "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere". It is interesting to note that in *McCollum* the four dissenting Justices in *Everson* con-

curred. Mr. Justice FRANKFURTER, while recognizing (p. 213) the existence of a clash in views as to "what the wall separates", nonetheless made it very clear that the First and Fourteenth Amendments "have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church' ".

The New York released time program was tested and approved in *Zorach* v. *Clauson* (343 U. S. 306). This permitted release of public school students during class hours for religious instruction off the school grounds, provided that written parental approval was first obtained. All costs were paid by the interested religious organizations. Some have read *Zorach* as a retreat from *McCollum*, but a majority of the United States Supreme Court did not think so. [fol. 150] In sustaining the program, the court removed any possible doubt that the principle of "complete and unequivocal" separation enunciated in *McCollum* was being reaffirmed since "the prohibition is absolute" (p. 312). As the court expressed it, "*We follow the McCollum case*" (p. 315; italics supplied). In deciding the merits as they did, the United States Supreme Court took the view that New York was "adjusting the schedule of public events to sectarian needs * * * [in the] best of our traditions", for to hold otherwise, in its opinion, "would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. * * * The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here" (p. 314).

It is also interesting to note that in *McGowan* v. *Maryland* (366 U. S. 420) Mr. Justice DOUGLAS took occasion to sharpen what he had previously said in *Zorach* about our being a "religious people" by writing:

"But those who fashioned the Constitution decided that if and when God is to be served, His service will not be motivated by coercive measures of government. * * * [The

First Amendment] means, as I understand it, that if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government. * * * The idea, as I understand it, was to limit the power of government to act in religious matters (*Board of Education* v. *Barnette*, *supra*; *McCollum* v. *Board of Education*, 333 U. S. 203), not to limit the freedom of religious men to act religiously nor to restrict the freedom of atheists or agnostics.

"The First Amendment commands government to have no interest in theology or ritual; * * * On matters of this kind government must be neutral." (*McGowan* v. *Maryland*, 366 U. S. 420, 563-564, *supra*.)

Very recently *McCollum* (*supra*) was employed to strike down Maryland's "belief in God" test for public office as an unconstitutional invasion of "freedom of belief and religion" and, accordingly, unenforcible (*Torcaso* v. *Watkins*, 367 U. S. 488, 495), the Supreme Court stating: "Neither [a State or the Federal Government] can constitutionally pass laws nor impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." It is clear, therefore, that the "establishment" clause should not have [fol. 151] the narrow application which a majority here would ascribe to it, and that it bars the action taken by the school board.

Running through the fabric of these definitive decisions, like the pattern of a tree of life in an intricate tapestry, is a clearly defined line of demarcation between church and State, which may not be overstepped in the slightest degree in favor of either the church or the State. In such light, a board of education may not require the saying of the Regents prayer as a daily school procedure. It is a form of State-sponsored religious education; in fact, according to the Regents, its purpose is "teaching our children, as set forth in the Declaration of Independence, that Almighty God is their Creator" (1951 Statement of Belief) and "will give to the student an understanding and appreciation of his role as an individual endowed by his Creator * * * and of reverence for Almighty God." It would thus "fulfill its

[the school's] high function of supplementing the training of the home" (Fundamental Beliefs, Regents Recommendations, adopted March 25, 1955). This requirement falls squarely within the categories of disability accounting for the decisions in *Everson* and *McCollum* (*supra*): use of public school classrooms during regular school hours, limitation of participation to those children whose parents consent and, in addition, being led by a teacher or by a person designated by the teacher. Under such announced purpose and method of performance, it cannot be less than instruction contrary to the establishment and freedom clauses, nor can the requirement be excused on the theory that the saying of the prayer—although conducted in the presence of the student body in the assembly hall of the classroom—is nonetheless a voluntary act, since no child is "required or encouraged to join in said prayer against his or her wishes" (Answering Affidavit), or on the theory that during the saying the child may remain silent, leave the room or report late. This is no answer, for it contains the very elements the prayer is supposed to eliminate: divisiveness, a type of compulsion, exerting as it does a pressure which an immature child is unable to resist because of his inherent desire to conform, and constituting a subtle interference by the State with the religious freedom guaranteed by the First Amendment. As Mr. Justice FRANKFURTER so aptly phrased it: "Separation means separation, not something less * * *. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." (*McCollum, supra*, p. 231.)

[fol. 152] The mere circumstance that the children of these petitioners may constitute a minority is no justification for rejecting their petition. The guarantees of the Bill of Rights, of which the First Amendment is the very cornerstone, were designed to protect minorities, which include diverse religious sects and atheists. While majority rule is an accepted incident of the political aspects of the democratic process, nothing in the Bill of Rights permits imposing the will of a majority—even in the slightest degree—

upon an objecting minority, contrary to its protective cloak (*Torcaso* v. *Watkins, supra; Board of Educ.* v. *Barnette*, 319 U. S. 624). The very fact that the school board is charged with the duty of educating the young who are compelled to attend public school, except in certain instances not presently pertinent (Education Law, §3212), is reason enough to observe scrupulously the establishment and freedom clauses here invoked. What was said in *McCollum* is appropriate here: "We renew our conviction that 'we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.' *Everson* v. *Board of Education*, 330 U. S. at 59. If nowhere else, in the relation between Church and State, 'good fences make good neighbors.'" (*McCollum, supra*, p. 232.)

The sponsors of the Regents prayer claim that it is nonsectarian in nature, a simple statement acknowledging the existence of and our dependence upon a Supreme Being; that such reference is of much the same character as the reference to God in various holiday programs (i.e., Christmas, Easter, Thanksgiving Day), in various official oaths, in invocations and benedictions said at most public gatherings, at meetings of some official bodies as well as in the inscription of the motto "In God We Trust" on coins, stamps and bank notes. Although these references may well be regarded as a permissible illustration that we are a religious people (cf. *Zorach* v. *Clauson, supra*), it does not follow that the Regents prayer is beyond the reach of the First Amendment. Such an approach belies the avowed purpose of the Regents which, as we have pointed out, was to commence "teaching our children" (Statement of Belief). In our view, this conflicts with the establishment clause which, under the Fourteenth Amendment, applies to the State—and Boards of Education are not excepted (*Board of Educ.* v. *Barnette, supra*). While the *Barnette* case dealt with the punitive consequences of noncompliance, the United States Supreme Court again made it clear that "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their

[fol. 153] faith therein" (p. 642). The pledge of allegiance was neither designed nor intended for other than a patriotic purpose; yet, as applied to children who were expelled for refusal to comply because of religious scruples and whose absence thereby became unlawful, subjecting them and their parents or guardians to punishment was held unenforcible as to them. Under the Federal Constitution, it employed an impermissible means of achieving "national unity". "Compulsory unification of opinion", as Mr. Justice JACKSON in his illimitable forthrightness said (p. 641), "achieves only the unanimity of the graveyard." The inculcation of religion is a matter for the family and the church. In sponsoring a religious program, the State enters a field which it has been thought best to leave to the church alone. However salutary the underlying purpose of the requirement may be, it nonetheless gives to the State a direct supervision and influence that overstep the line marking the division between church and State and cannot help but lead to a gradual erosion of the mighty bulwark erected by the First Amendment. This does not mean that the State is or should be hostile to religion—merely that the State should not invade an area where the constitutionally protected freedom is absolute and not open to the vicissitudes of legislative or judicial balancing.

The order appealed from should be reversed and the prayer of the petitioners should be granted, directing the Board of Education of Union Free School District Number Nine, New Hyde Park, to discontinue the saying of the Regents prayer in the schools within its district.

Judge FOSTER concurs with Chief Judge DESMOND; Judge FROESSEL concurs in an opinion in which Judge VAN VOORHIS concurs; Judge BURKE concurs in a separate opinion, Judge DYE dissents and votes to reverse in an opinion in which Judge FULD concurs.

Order affirmed.

[fol. 154] Triple Certificate to foregoing paper (omitted in printing).

[fol. 155]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

• • • • • • •

Witness,

THE HONORABLE CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, *Clerk.*

[fol. 156]

No. 456

In the Matter of

the Application of STEVEN I. ENGEL, & ors., Appellants,

vs.

WILLIAM J. VITALE, JR., & ors., constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York, Respondents,

directing them to discontinue a certain school practice,

and

HENRY HOLLENBERG, & ors., Intervenors-Respondents.

REMITTITUR—July 7, 1961

Be It Remembered, That on the 24th day of December in the year of our Lord one thousand nine hundred and sixty, Steven I. Engel, & ors., the appellants in this cause, came here unto the Court of Appeals, by Butler, Jablow & Geller, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Supreme Court, Nassau County. And William J. Vitale, Jr., & ors., constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York, the respondents, and Henry Hollenberg, & ors., the intervenors-respondents in said cause, afterwards appeared in said

Court of Appeals by Gunn, Neier & Daiker, and Hahn, Hahn & Ford, their respective attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 157] Whereupon, The said Court of Appeals having heard this cause argued by Mr. William J. Butler, of counsel for the appellants, and by Mr. Bertram B. Daiker, of counsel for the respondents, and by Mr. Porter R. Chandler, of counsel for the intervenors-respondents, briefs filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the order appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

[fol. 158] Therefore, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, July 7, 1961.

Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 159]

At a Special Term Part II of the Supreme Court held in and for the County of Nassau, at the Court House in Mineola, New York, on the 23rd day of October, 1961 at 33 Willis Ave., Mineola, N. Y.

Present: Hon. Mario Pittoni, Justice.

#1824/1959

In the Matter of the Application of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH, Petitioners-Appellants,

—against—

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York, Respondents-Respondents,

directing them to discontinue a certain school practice

and

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE, Intervenor-Respondents-Respondents.

[fol. 160]

ORDER—October 23, 1961

The above named Petitioners-Appellants, having appealed to the Court of Appeals from the final order of the Supreme Court of the State of New York, County of Nassau, entered in the Office of the Clerk of the County of

Nassau on the 17th day of March, 1961; and from an interlocutory order of the Appellate Division of the Supreme Court, Second Department, entered in the office of the Clerk of that court on October 17, 1960, affirming the interlocutory order herein of the Supreme Court, County of Nassau, entered in the Office of the Clerk of the County of Nassau on October 5, 1959; and the Court of Appeals having heard said appeal and ordered and adjudged that the order so appealed from be affirmed without costs, and the remittitur of the Court of Appeals having been duly filed in the Office of the Clerk of the County of Nassau on the 19th day of July, 1961;

Now on reading and filing the remittitur from the said Court of Appeals herein, and on motion of Gunn, Neier & Daiker, attorneys for the Respondents herein, it is

Ordered and Adjudged, that the order and judgment of said Court of Appeals be and the same hereby is made the order and judgment of this Court, without costs.

Enter,

Mario Pittoni, J.S.C.

Granted: October 23, 1961 Entered: October 23, 1961

Francis J. Anderson, County Clerk of Nassau County.

[fol. 161]

SUPREME COURT OF THE UNITED STATES

No. 468—October Term, 1961

STEPHEN I. ENGEL, et al., Petitioners,

vs.

WILLIAM J. VITALE, JR., et al.

ORDER ALLOWING CERTIORARI—December 4, 1961

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Court of Appeals

of the State of New York 424

—o—

In the Matter of the Application

of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,
Petitioners-Appellants,

against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York, 425
Respondents-Respondents,

directing them to discontinue a certain school practice,

and

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE, 426
Intervenor-Respondents-Respondents.

—o—

Additional Statement to the Court of Appeals

This is an appeal, pursuant to Sections 588 and 590 of the Civil Practice Act, from a final order of the Supreme Court, Nassau County, which dismissed appellants' petition and which was entered after the Appellate Division, Second

427 *Additional Statement to the Court of Appeals*

Department, had affirmed an interlocutory order of the Supreme Court, Nassau County. The interlocutory order had denied appellants' petition, but had remanded the matter to respondent Board of Education for proceedings as directed in the order.

The proceeding was brought pursuant to Article 78, of the Civil Practice Act, to compel respondents to cease the practice of the daily recitation of the so-called "Regents Prayer" in the public schools under the jurisdiction of the respondent
428 Board, on the grounds that such recitation violated the Federal and New York State Constitutions. The Supreme Court, Nassau County, declared that the daily recitation of the Regents Prayer in public schools was not unconstitutional, although it remanded the matter to the respondent Board with specific directions that procedures be taken to insure that the recitation was strictly voluntary and non-compulsory.

Although the Supreme Court, Nassau County, inserted in its order a clause granting appellants permission to appeal therefrom under Sec-
429 tion 1304 of the Civil Practice Act, the order was interlocutory rather than intermediate, since it determined the merits of the action and denied the relief requested in the petition.

The Appellate Division affirmed this interlocutory order, and appellants filed a notice of appeal from the order pursuant to Section 588, of the Civil Practice Act, under the theory that all the merits of the proceeding had been finally determined by the interlocutory order.

Subsequent to appellants' filing of the notice of appeal and record on appeal from the Appellate

Division's order of affirmance of the interlocutory order, the Supreme Court, Nassau County dismissed appellants' petition on the basis of the actions taken by respondent school board in response to the directions of the Supreme Court in its interlocutory order.

Appellants filed a notice of appeal from the final order to the Court of Appeals pursuant to Sections 590 and 588 of the Civil Practice Act, and the additional papers contained in this supplement are being submitted with the record on appeal filed in connection with the appeal from the interlocutory order, as the record on appeal herein. 431

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Notice of Appeal to Court of Appeals

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

Index No. 1824/1959

In the Matter of the Application

of

434 STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,
Petitioners-Appellants,

against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,
Respondents-Respondents,

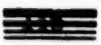
directing them to discontinue a certain school practice,

435 *and*

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,
Intervenor-Respondents-Respondents.

Sirs:

PLEASE TAKE NOTICE, that pursuant to the provisions of Section 588 and Section 590, of the



Civil Practice Act, that the above-named Petitioners, Steven I. Engel, Daniel Lichtenstein, Monroe Lerner, Lenore Lyons and Lawrence Roth, hereby appeal to the Court of Appeals from the final order herein of the Supreme Court of the State of New York, County of Nassau, entered in the office of the Clerk of the County of Nassau, on the 17th day of March, 1961, and from each and every part of the said order, which order dismissed this proceeding on the merits pursuant to Section 1300 of the Civil Practice Act, and which order was entered after the entry of an 437 interlocutory order of the Appellate Division of the Supreme Court, Second Department, in the office of the Clerk of that court on October 17, 1960, affirming so much of the interlocutory order herein of the Supreme Court, County of Nassau, entered in the office of the Clerk of the County of Nassau on October 5, 1959, as denies the petition herein, denies the petitioners' demand for a jury trial, and remands the matter to the Respondent Board of Education for further proceedings, and the said petitioners shall bring up for review upon this appeal, the said interlocu- 438 tory order of the Appellate Division, Second Department, and each and every part thereof.

Dated: New York, March 31, 1961.

Yours, etc.,

BUTLER, JABLOW & GELLER
Attorneys for Petitioners-
Appellants
400 Madison Avenue
New York 17, New York

439 *Notice of Appeal to Court of Appeals*

To:

Clerk of the County
of Nassau
Mineola, New York

Gunn, Neier & Daiker, Esqs.
Attorneys for Respondents-
Respondents
49 Main Street
Port Washington, New York

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Hahn, Hahn & Ford, Esqs.
Attorneys for Intervenor-
Respondents-Respondents
117 Pennsylvania Avenue
Brooklyn 7, New York

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Final Order Appealed From

At a Special Term of the Supreme Court, Part I held in and for the County of Nassau on the 17th day of March, 1961.

Present:

HON. BERNARD S. MEYER,
Justice.

[SAME TITLE]

443

On reading and filing the Order to Show Cause herein dated February 24th, 1961, and the affidavit of Philip J. Fried, sworn to February 21st, 1961, in support of respondent's motion for a final order pursuant to Section 1300 of the Civil Practice Act dismissing the within proceeding on the merits; and the affidavit of Thomas J. Ford, sworn to March 1st, 1961, in support thereof; and the affidavit of Stanley Geller, sworn to March 1st, 1961 in opposition thereto; and

444

This motion having come on to be heard before me on March 3, 1961, and after hearing Gunn, Neier & Daiker (Bertram B. Daiker and Wilford E. Neier, of counsel) attorneys for respondents, and Hahn, Hahn & Ford (Porter R. Chandler, Thomas J. Ford and Richard E. Nolan, of counsel), attorneys for intervenor-respondents, all in support of the aforementioned motion; and after hearing Butler, Jablow & Geller (William J. Butler, Stanley Geller and Peter B. Schwartzkopf, of counsel), attorneys for petitioners, in opposition thereto; and

445 *Final Order Appealed From*

It appearing to the Court that respondent has complied with the directions contained in the opinion of this Court in this proceeding dated August 24, 1959; and due deliberation having been had, it is

ORDERED that this proceeding be and is dismissed on the merits, pursuant to Section 1300 of the Civil Practice Act.

Enter:

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BERNARD S. MEYER,
J. S. C.

Granted
Mar. 17, 1961

FRANCIS J. ANDERSON
Clerk

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448

Order to Show Cause

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

[SAME TITLE]

On reading the affidavit of Philip J. Fried, sworn to February 21, 1961, and sufficient cause therefor appearing, it is 449

ORDERED that petitioners and intervenor-respondents show cause at a Special Term Part I of this Court to be held at the County Courthouse, 33 Willis Avenue, Mineola, New York, on the 3rd day of March, 1961 at 10:000 o'clock in the forenoon or as soon thereafter as counsel may be heard why a final order should not be made and entered pursuant to Section 1300 of the Civil Practice Act dismissing this proceeding on the merits; and it is further

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ORDERED, that service of a copy of this order and of the papers on which it is granted made on the attorneys for petitioners and on the attorneys for intervenor-respondents on or before the 28th day of February, 1961 at 5:00 o'clock in the afternoon, shall be sufficient.

Dated: Mineola, New York
February 24, 1961.

WILLIAM R. BRENNAN, JR.,
Justice of the Supreme Court
of the State of New York.

451

Affidavit of Philip J. Fried, Read in Support of Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

[SAME TITLE]

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452 STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

PHILIP J. FRIED, being duly sworn, deposes and says:

1. He is a respondent in this proceeding and is the duly elected President of the Board of Education of Union Free School District No. Nine, New Hyde Park, New York and has served in that capacity since July 1, 1960, prior to which date, he served as a member of said Board. By reason thereof, he is fully familiar with the facts
453 and circumstances of this proceeding and with the actions taken by said Board to comply with the directions of this Court, embodied in the opinion of Mr. Justice Meyer rendered at Special Term on August 24, 1959.

2. The aforementioned opinion directed:

(a) that the resolution of the Board dated July 8, 1958 be modified by the establishment of a procedure:

> "* * * whereby the parents of each child are advised of the adoption of the resolution calling for the saying of prayer, of the wording of the prayer and of the procedure to be

followed when it is said and requested to indicate whether the child shall or shall not participate in the exercise."

(b) that appropriate regulations be adopted by the Board:

"* * * making clear that neither teachers nor any other school authority may comment on participation or non-participation in the exercise nor suggest or require that any posture or language be used or dress be worn or be not used or not worn." 455

(c) that appropriate provision be made for non-participants in the prayer exercise, the nature of such regulations being left to the informed judgment of the Board.

3. On September 3, 1959, the Board duly adopted and promulgated the following regulations in accordance with the aforementioned directions:

"Regulations Regarding the School Prayer Adopted by the Board of Education on September 3, 1959 456

In implementation of instructions heretofore issued in connection with the daily recitation of the Regents Prayer at the opening of each school day, as adopted on July 8, 1958, the following regulations are adopted by the Board of Education:

1. Neither teachers nor any school authority shall comment on participation or non-participation in the exercise nor suggest or request that any posture or language be used or dress be worn or be not used or not worn.

457 *Affidavit of Philip J. Fried*

2. Provision is to be made for those children who are to be excused from participating or from the room during the prayer exercise.

3. Any child may be excused on written request of the parent or legal guardian and all parents will be so advised that the request should be so made, addressed to the principal of the school which the child attends."

458 4. In implementation of the aforementioned regulations, the Board issued the following letter to each parent and taxpayer within the School District:

"Board of Education
Union Free School District No. 9
New Hyde Park, New York

September 8, 1959

Dear Parent and Taxpayer:

Opening exercises at the commencement of
459 our school day include the Regents Prayer, adopted by the Board of Education on July 8, 1958, which reads:

'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.'

Any parent or guardian who does not wish his child to say the prayer is requested to write a letter to the principal of the school his child attends, indicating whether he wants his child excused from the room or to remain

silent in the room while the prayer is being said.

Sincerely yours,

Lester G. Peck
Principal of the District."

5. These regulations and the procedures established pursuant to them have been in effect within the District at all times since September, 1959.

6. All requests from parents or guardians that children be excused from participating in the 461
recitation of the Regents Prayer have been promptly honored by the Board. The Board has received no request that children be excused from the classroom during the recitation of the Prayer. Inasmuch as there are seven schools in the District, each with different facilities available and different starting times, it has been considered preferable to defer any decision with respect to the exact provision to be made for any such children until such a request is made and the situation as presented in the school or schools involved can be properly evaluated. At that time 462
the Board of Education stands ready to make provision in accordance with the Court's decision.

7. No previous request for this or any similar relief has been made to any court or judge.

WHEREFORE, it is respectfully requested that this Court enter a final order dismissing this proceeding on the merits, pursuant to Section 1300 of the Civil Practice Act.

PHILIP J. FRIED.

(Sworn to February 21, 1961.)

463

Affidavit of Thomas J. Ford, Read in Support of Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

[SAME TITLE]

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464 STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

THOMAS J. FORD, being duly sworn, deposes and says:

1. That he is a member of the law firm of Hahn, Hahn & Ford, attorneys for the intervenor-respondents, and that your deponent is fully familiar with all the facts and circumstances herein.

2. Your deponent has read the affidavit of
465 respondent, Philip J. Fried, now the duly elected President of the Board of Education of Union Free School District Number Nine, New Hyde Park, New York, sworn to the 21st day of February, 1961, and submitted herein in support of the motion for an order dismissing this proceeding on the merits.

3. In behalf of the intervenor-respondents, we respectfully join with the respondent School Board in requesting the relief sought.

THOMAS J. FORD.

(Sworn to March 1, 1961.)

466

Affidavit of Stanley Geller, Read in Opposition to Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.: 467

STANLEY GELLER, being duly sworn, deposes and says that:

I am a member of the firm of Butler, Jablow & Geller, attorneys for petitioners in this proceeding, and I submit this affidavit in opposition to respondents' motion for a final order dismissing the petition herein, based on certain actions alleged to have been taken by respondents after the subject matter of this proceeding was remanded to them by prior order of this Court.

468 Petitioners do not take the position that the actions alleged in respondents' motion papers to have been taken by respondents since remand have not been taken. Their opposition to the present motion is more fundamental.

Petitioners maintain that the saying of the so-called "Regents' Prayer" in the schools of Union Free School District No. 9, New Hyde Park, New York, at the direction and under the auspices of the respondents, constituting the Board of Education of that School District, violates the Constitutions of both this State and the United States,

469 for the reasons set forth in the petition herein and in the memoranda previously submitted to this Court. They maintain that the matter of the Prayer is not within the cognizance of the Board, and should not have been remanded to respondents for further consideration or action. They do not believe, therefore, that any actions taken by respondents on remand could have cured the fatal defect in the saying of the Prayer, as aforesaid.

Indeed, petitioners submit that any actions
470 taken by respondents since remand constitute an additional violation or additional violations of the State and Federal Constitutions.

STANLEY GELLER.

(Sworn to March 1st, 1961.)

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Stipulation Waiving Certification of Record to Court of Appeals

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the foregoing are true and correct copies of the Papers on Appeal to the Appellate Division, Second Department; the Final Order Appealed From, the Order to Show Cause, the Affidavit of Philip J. Fried, the Affidavit of Thomas J. Flood, all in support of the motion and the Affidavit of Stanley Geller, in opposition to the motion and the Notice of Appeal to the Court of Appeals, all of which are on file in the office of the Clerk of the County of Nassau.

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Certification of all of the foregoing papers is hereby waived.

Dated: New York, May , 1961.

BUTLER, JABLOW & GELLER,
Attorneys for Petitioners-Appellants.

GUNN, NEIER & DAIKER,
Attorneys for Respondents-Respondents.

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HAHN, HAHN & FORD,
Attorneys for Intervenor-Respondents-Respondents.